MISSISSIPPI LAW JOURNAL

LAMAR AND THE LAW AT THE UNIVERSITY OF MISSISSIPPI

Daniel J. Meador

AUTOMOBILES AND ALCOHOL TAX VIOLATIONS IN THE FIFTH CIRCUIT

Alfred E. Morton, III

FORMATION, OPERATION AND DISSOLUTION OF BUSINESS CORPORATIONS

Martin R. McLendon

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CONTENTS

LEADING ARTICLES

LAMAR AND THE LAW AT THE UNIVERSITY OF MISSISSIPPI ..... *Daniel J. Meador* 227

AUTOMOBILES AND ALCOHOL TAX VIOLATIONS IN THE FIFTH COURT ..... *Alfred E. Morton,* III 257

FORMATION, OPERATION AND DISSOLUTION OF BUSINESS CORPORATIONS ..... *Martin R. McClendon* 281

STATE BAR SECTION

PROGNOSIS OF THE UNIFORM COMMERCIAL CODE 292

THE MISSISSIPPI BAR FOUNDATION: A CHALLENGE AND OPPORTUNITY 299

STUDENT COMMENTS

COUNSEL IN CRIMINAL CASES IN MISSISSIPPI 304

GRANTOR'S POSSESSION AS CONSTRUCTIVE NOTICE 325

DIRECT RESTRAINTS ON THE ALIENATION OF PROPERTY IN MISSISSIPPI 333

RECENT DECISIONS

Constitutional Law—Solicitation Statute—Applied to NAACP Activities 344

Eminent Domain—Taking of Executory Interests—Compensation 346

Torts—Action by Wife Against Husband for Personal Injuries 348

Trade Regulations—Good Faith Defense under Robinson-Patman Act—Gasoline Price Wars 349

RECENT BOOKS

Perpetuities Law in Action ..... *Roscoe Cross* 353

Soviet Legal Institutions: Doctrines and Social Functions ..... *Joseph O. Baylen* 358

Howell's Copyright Law ..... *Walker L. Watters* 360

Books Received 362

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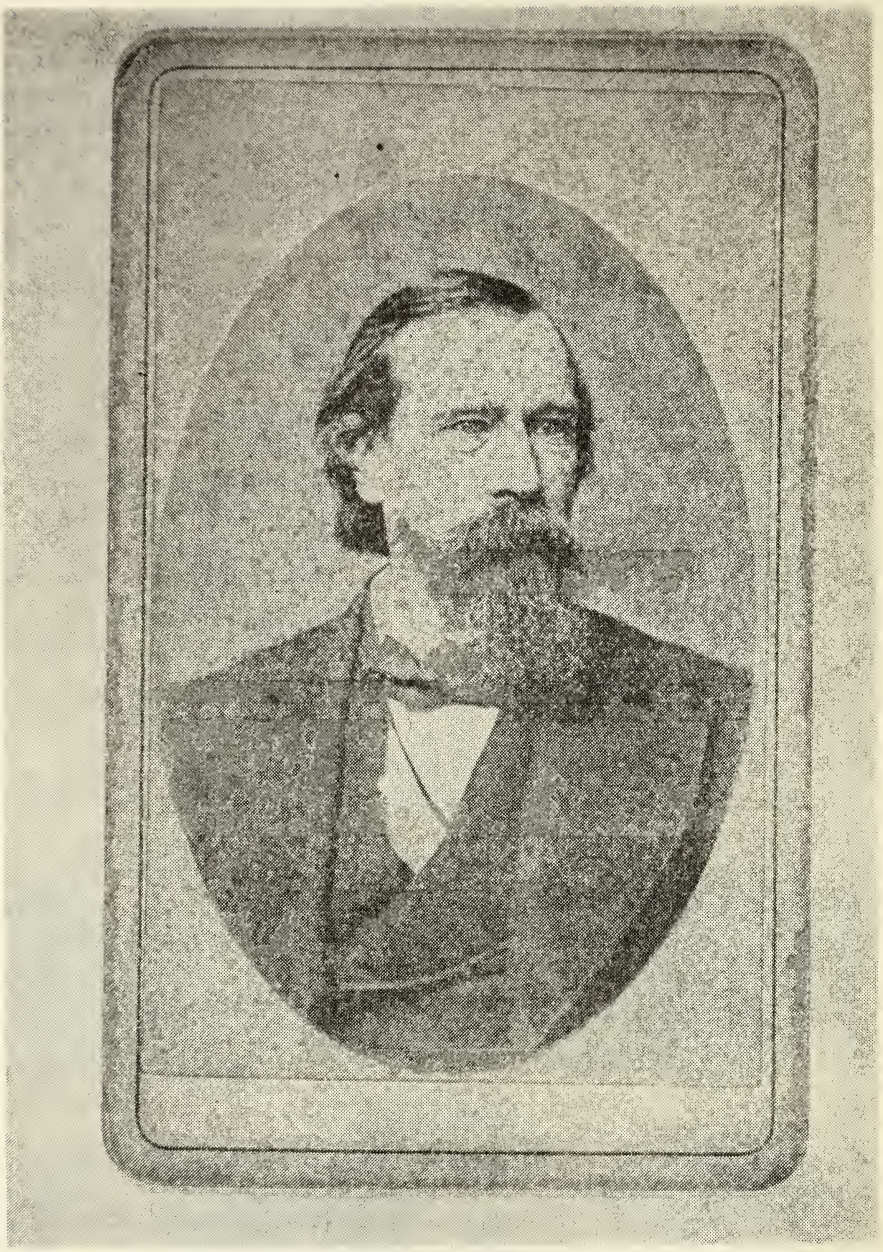

L. Q. C. LAMAR

Mississippi Law Journal

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LAMAR AND THE LAW AT THE UNIVERSITY OF MISSISSIPPI

*Daniel J. Meador**

The appointment of law professors to the bench has ceased to be unusual in the twentieth century. On the United States Supreme Court there are the familiar examples of Stone, Frankfurter, Douglas, and Rutledge. Hughes and Holmes had also taught briefly. Prior to these, however, the only ex-law professor on the Supreme Court was the bearer of that ponderous Roman name, Lucius Quintus Cincinnatus Lamar, who was professor of law at the University of Mississippi from 1866 to 1870. There have been other Justices, such as Joseph Story, who taught during or after their judicial service. But Lamar was the first, and the only one before this century, to have served as a full-time University law professor before appointment to the Court. That aspect of his career, however, went unmentioned by both friend and foe during the heated confirmation fight when he was nominated by Cleveland in 1887.

Lamar's nomination was no routine filling of a Court vacancy. It was indeed unique. In the first place, a Democratic President had not had the opportunity to name a Justice since Buchanan appointed Nathan Clifford twenty-nine years before. Secondly, Lamar was not only a Democrat whose name was being sent before a Republican controlled Senate, he was also a former secessionist and Confederate, not a lukewarm, passive southerner in that doomed effort, but a positive actor in promoting Mississippi's withdrawal from the Union, a Colonel in the Confederate Army and a diplomatic representative of the Confederacy in Europe. In short, from the view point of the Republicans, he had made war on the Constitution and the United States Government, had given aid and comfort to their enemies. This was the man now being proposed to sit on the country's highest tribunal, charged with the

*Professor of Law, University of Virginia. This paper is based on material being collected for a lengthier study of Lamar's career. The research has been assisted by a grant from the University of Virginia Law School Foundation.

duty of interpreting that Constitution, including the amendments resulting from the defeat of his cause. At bottom this was the real basis for the widespread opposition to his confirmation. Many people, Senators and others, frankly said so, said that no "ex-rebel" should ever be on the Supreme Court. Others, not so candid, argued that Lamar was too old—then 62—and that he had insufficient experience at the bar. A rational examination of Lamar's qualifications was perhaps too much to expect in the climate of the day. Yet it still seems odd that apparently no one even mentioned his four-year experience as a full-time teacher, especially in view of its novelty in the background of a judicial nominee at that time.

Despite the peculiar circumstances, Lamar was finally confirmed by a margin of three votes. An Independent and two Republicans broke ranks and voted with the Democrats to put him over. On January 18, 1888, he took his seat on the United States Supreme Court, thereby becoming a dramatic symbol of national reunion.

Lamar's law professorship, overlooked then, has received little attention elsewhere. In an effort to fill that void this paper undertakes an examination of the man and his work at that period in his life. The period was in effect an interlude, which for Lamar divided careers, marking the end of one and the beginning of another.

I. Appointment as Law Professor

In the late spring of 1865, Lamar came back to Mississippi, to the town of Oxford, from Appomattox Court House under a federal parole. His last official assignment for the Confederacy had been that of Colonel on the Military Court, Third Corps, Army of Northern Virginia, and Acting Aide to Gen. James Longstreet.[1] Four years earlier, as a thirty-five year old Congressman who had worked diligently for the states rights movement, he had the distinction of drafting the Mississippi Ordinance of Secession. In the wartime interim his life had been one of constant travel and striking contrasts. He had seen Richmond as the gay Confederate capital, then later as a burned city occupied by a conquering army. He had commanded an infantry regiment in combat and seen men dying within his reach. He had also mingled in high-level social and diplomatic gatherings in Europe. For he, Lucius Quintus Cincinnatus Lamar, had been dispatched by Jefferson Davis himself as Commissioner to the Czar of Russia from the Confederate States of America. But now all that had vanished in defeat, a defeat which meant more than the destruction of towns, homes, slavery, and the dream

[1] *Paroles of the Army of Northern Virginia*, 15 Southern Historical Society Papers 70 (1887); Mayes, Lucius Q. C. Lamar: His Life, Times, and Speeches 114-16 (1896) [hereinafter cited as Mayes].

of an independent nation. A whole constitutional theory about the nature of the Union had been relegated to history. Lamar's unquestioning belief that under the Constitution a state had a lawful right to withdraw from the Union had not prevailed in the ultimate forum. That was the one inescapable fact he had personally seen established at Appomattox.

At home the burned-up center of Oxford—the debris marking the site of the Courthouse and square of business houses—was a constant, tangible reminder of the disaster. Several residences were also gone, including the town's finest, the twenty-room home of Jacob Thompson. Close by the University, a mile west of the square, were 700 soldier graves. In the midst of this, however, Lamar found a bright spot in his immediate family, for his wife and four children had survived, and they were once more together. His father-in-law, Judge A. B. Longstreet, was also back in Oxford, now elderly and retired. But both of Lamar's brothers and both of his law partners—Mott and Autrey of Holly Springs—all four of them colonels, had been killed on the battlefield.

Lamar was troubled, as were many men in the South, over how to pick up again at age forty, in a new world, the old landmarks gone. He toyed with the idea of going to Memphis, but in the end he formed a partnership with Gen. Edward Cary Walthall and went into law practice at Coffeeville, the small county seat of Yalobusha County, some thirty miles south of Oxford on the Mississippi Central Railroad.[2] This began an enduring friendship, and, with one of history's curious turns, Walthall succeeded Lamar in the United States Senate twenty years later. Financially they did relatively well, but that meant little more than subsistence. Lamar was saddled with prewar debts, many of which he did not think he owed, but all of which he eventually paid.[3] The firm was destined to last only a year.

It was during that year in Coffeeville, in the spring of 1866, that Lamar and John N. Waddel, newly made Chancellor of the University of Mississippi, began discussing the possibility of Lamar's coming on the faculty. The two had long known each other. Although it is not clear who initiated the subject, it does appear that Lamar was receptive to the idea.[4] For one thing, the $2,000 annual salary was attractive in the economically depressed conditions. For another, the town of Oxford with old friends, his wife's parents, and the advantages of the state University, probably seemed more appealing than a village law

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[2]MAYES 120.

[3]Letters From Lamar to "Jimmy," Aug. 11, 1868, in the Lamar Papers (So. Hist. Collection, Univ. of N. C. Library); MAYES 124.

[4]Letter From Waddel to Lamar, June 2, 1866, in the Lamar Papers (Miss. Dep't of Archives).

practice in Yalobusha County. Also the United States Court for Northern Mississippi, which had been in Pontotoc before the war, was being reactivated at Oxford, and this was an added attraction for the practice of law which he hoped to continue. Waddel was pushing the idea, even to the extent of privately lobbying for Lamar's appointment with the three trustees who lived in Oxford. Waddel seems to have been motivated in part by his desire to have someone share his teaching load, as he was then conducting classes in six departments. At the same time he doubtless thought well of Lamar, having been associated with him on the faculty in the early fifties. In any event, in the summer of 1866 the University Board of Trustees tendered Lamar an appointment to the Chair of Ethics and Metaphysics, and he willingly accepted.[5] This seems to have been his choice of positions at that time, but the Law School had not yet been reopened.[6]

Lamar came as no stranger to teaching or to the University of Mississippi. The last year before the war he had held this same chair, though he was then still a member of Congress and was away from the University over half of the session on politics, mainly the business of secession. Eight years before that, in 1850-52, he had served for two terms as Adjunct Professor of Mathematics while Judge Longstreet, his father-in-law, was president.[7] In addition to this experience and his training as a student at Emory College, Lamar's chief background for the subjects he was now called on to teach was self-education through wide reading. In the mid-fifties he had spent eighteen months of semi-seclusion on an eleven-hundred acre place, appropriately named "Solitude," along the Tallahatchie River in the northern part of Lafayette County. Being a contemplative type and not one to become absorbed in agricultural activities, he occupied himself largely with serious reading. He often said this was the most profitable study of his life.[8] Beyond that, his horizons must have been widened by his nine months of diplomatic activity in London and Paris in 1863.

The fall of 1866, when Lamar joined the faculty, was the beginning of the second postwar session. Fortunately for the University, immediately after the collapse of the Confederacy Andrew Johnson had appointed William L. Sharkey provisional governor of the state. As a former Mississippi Chief Justice, Sharkey was widely respected. He had been a member of the original University Board of Trustees and was alert to the needs of education. One of his first acts as provisional

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[5] *Ibid.;* Minutes of Board of Trustees, Univ. of Miss., June 28, 29, 1866, on file in the office of the Chancellor, Univ. of Miss. [hereinafter cited as Board Minutes].

[6] Letter cited note 4 *supra.*

[7] MAYES 46, 56-57, 84; HISTORICAL CATALOGUE OF THE UNIVERSITY OF MISSISSIPPI, 1849-1909, pp. 87, 91 (1910) [hereinafter cited as HISTORICAL CATALOGUE].

[8] MAYES 61.

governor was to reopen the institution and to allocate $6,000 from the cotton tax for its operation.[9] Because of this, academic work had gotten underway at Oxford in the fall of 1865, after a four-year suspension. Besides Chancellor Waddel there were then only three faculty members. But the surprising appearance of 193 students caused the Board to add three more Professors by the next session, of whom Lamar was one.[10] The University had also been unusually fortunate in having its buildings spared when U. S. General A. J. "Whiskey" Smith had put the torch to the main part of town. However, after four years of fairly steady use as a military hospital, first for one side then the other, they had become run down. Needed repairs were undertaken during the session of 1865-66.[11]

Lamar found little change from pre-war days on the campus. Only the cemetery was new. The large wooded circle was still dominated by the three-story, red-brick Lyceum standing on the upper west side with its portico of six white columns. To the right and left around the circular drive were the dormitories: Rittenhouse, Jefferson, Madison, Lafayette, Franklin and Washington Halls. Then there were quarters for the professors. And on the eastern side, opposite the Lyceum, was the University Chapel. Off a bit from this circular grouping were the observatories—the dome and squat towers standing as reminders of former Chancellor F. A. P. Barnard, gone since the beginning of the war and now president of Columbia College in New York.[12]

The session of 1866 opened with seven professors on hand. Enrollment had jumped to 246 students,[13] many of them veterans, a much more serious-minded group than the rowdy planters' sons of prewar days.[14] Lamar began with classes in logic and in mental and moral philosophy.[15] The session had been underway less than a month, however, when the Board of Trustees directed that he assume the law professor's duties in addition to his other subjects. Neither of the two former law teachers—Stearns and Trotter—had come back after the war, and the man newly elected to the chair, H. F. Simrall, had not yet appeared.[16] This was to be a temporary assignment, but, after three

[9]WADDEL, MEMORIALS OF ACADEMIC LIFE 445-48 (1891) [hereinafter cited as WADDEL]; LYNCH, THE BENCH AND BAR OF MISSISSIPPI 189-98 (1881).

[10]WADDEL 300, 456; CABANISS, A HISTORY OF THE UNIVERSITY OF MISSISSIPPI 67-71 (1949).

[11]The Oxford Falcon, Feb. 22, 1866 (a newspaper published weekly in Oxford for several years after the war); Johnson, *The University War Hospital*, 12 PUBLICATIONS OF THE MISS. HIST. SOC'Y 94 (1912).

[12]WADDEL 263-64; FULTON, MEMOIRS OF FREDERICK A. P. BARNARD 234-90, 335 (1896).

[13]WADDEL 300.

[14]WADDEL 448; WADE, AUGUSTUS BALDWIN LONGSTREET 297 (1924).

[15]Letter cited note 4 *supra*.

[16]Board Minutes, Oct. 19, 1866.

months passed and Simrall still did not arrive, the Board in January 1867, formally elected Lamar as Professor of Governmental Science and Law.[17] He then gave up the Chair of Ethics and Metaphysics,[18] and thereafter, until June 1870, when he resigned, he taught exclusively in the law school as its sole professor.[19] Thus he fortuitously fell into the law professorship. Yet it turned out to be the place for which he probably was best suited, despite the fact that his own legal education had been entirely in a law office.

II. The Law School: Origin and Growth

The Law School had been created at the University of Mississippi by an act of the legislature in 1854, the first new department to be added after the institution opened with its general academic program in 1848.[20] The legislature had acted on the basis of a report from the trustees[21] signed by the board president, Jacob Thompson, the man largely responsible for getting Lamar first elected to Congress in 1857. The report stated:

> Our graduated young men often aspire to act in the counsels of their country; and history and observation both teach them to look to the Bar as the place of preparation and of trial, to vindicate their fitness for the Halls of legislation. It is well known that for a period of a thousand years the Bar has been the great road to the dignities, the titles, the places and the power of the politician, wheresoever the common law of England has been enforced. The University greatly needs a professorship of law. But not of law alone, in the opinion of the undersigned. The Philosophy of Government should be taught together with it, and history, which is philosophy teaching by example.[22]

The trustees then explained that government was taught in few southern schools and that in going north to study southern youth ran the danger of being exposed to instruction "antagonistic in its principles to Southern views of the right philosophy of government." The report continued:

> A youth coming from the walls of the University with enlarged and fixed principles of political justice—with elevated notions

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[17]Board Minutes, Jan. 21, 1867; WADDEL 459.

[18]Minutes of the Faculty, Univ. of Miss., Jan. 31, 1867, on file in the office of the Chancellor, Univ. of Miss. [hereinafter cited as Faculty Minutes].

[19]WADDEL 459.

[20]HISTORICAL CATALOGUE 61-63. For a brief history of the law school in its early years see MAYES, HISTORY OF EDUCATION IN MISSISSIPPI 143 *et seq.* (1899) [hereinafter cited as MAYES, HISTORY].

[21]Board Minutes, Jan. 12, 1854.

[22]*Ibid.*

> of the use, the scope and the design of government—would not be apt to sink into a factionist, or to merge the philosophic statesman in the turbulent demagogue.
>
> To instruction in Law & Government, we would superadd (as we have said) instruction in History and International Law; and we think a single professor would be adequate to discharge the combined duties that are here indicated. But it would require no ordinary man. Such a man as would fully suit the place would be of more difficult selection, than any other professor in the University. His character—his acquirements, even his place of residence and of education would have to be considered. But it is in the power of compensation to procure such a man, we suppose, and we respectfully ask the legislature to aid us in raising this compensation.[23]

The tenor of the report indicates that this was not to be a narrow practitioner's school on the lines of the early Harvard design; instead it was Jeffersonian in its broad conception of legal education.[24] Clearly though it was also to be "sound" in prewar southern constitutional theory.

The legislature responded promptly that same year, and William F. Stearns was named to the new professorship. The Board, as if to remove doubts, passed a resolution that he was to be regarded in all respects as a member of the faculty.[25] Also the Board prescribed that law students should have use of the college library (which then contained about 3,000 volumes), but otherwise the law students "shall be disconnected with the college, save as to moral government."[26] In 1857 the state adopted the diploma privilege for the school's graduates.[27] A second professor, James Trotter, was added the year before the war.[28] Altogether, more than 100 young men pursued all or a part of the two-year law course before the institution closed in 1861, and 65 of them were graduated.[29]

The problem of a law library appears not to have received attention from the Board of Trustees for the first two years of the school's existence, though the enrollment had jumped from seven to 22 in that short period.[30] Then in 1856 the Board appropriated $2,000 for the purchase of law books, and at the same time provided $75 to rent a recitation room for the law class.[31] After another year's delay, no law

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[29]WADDEL 299; MAYES, HISTORY 146.

[23]*Ibid.*

[24]See REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 154-56 (1921).

[25]Board Minutes, July 14, 15, 1854; WADDEL 306.

[26]Board Minutes, July 15, 1854.

[27]HISTORICAL CATALOGUE 61-63.

[28]Board Minutes, June 27, 1860; LYNCH, THE BENCH AND BAR OF MISSISSIPPI 207 (1881); MAYES, HISTORY 144.

[30]*Ibid.*

[31]Board Minutes, July 18, 1856.

books having yet been acquired with this money, Stearns proposed that he sell his own law library to the University.[32] A committee of the Board examined the collection and reported that it contained 626 volumes well-selected and in excellent condition. The price asked by Stearns—$1,627—was below what would have to be paid elsewhere for the same books. Accordingly, the school bought the whole collection, paying for it out of the previous $2,000 appropriation.[33]

Stearn's library formed the core of the University's law library at least through Lamar's time, although there were other acquisitions before and after the war. In 1858 an appropriation was made to purchase the reports of the United States Supreme Court and to complete the New York and Tennessee reports.[34] Later, $150 was made available to bring the various sets up to date and to purchase other books in the law professor's discretion.[35]

Evidently the law school came to need more space because the Board at its June, 1860, meeting authorized its executive committee to rent rooms for a law library, law professor's study, and lecture room.[36] These quarters were rented from William Avent in Oxford and must have been off the main University campus. However, there was then only one session remaining before the war. In October 1861, when it was obvious that the University would have to be closed—only four students had appeared—the Board directed the executive committee to surrender the rented space except for the library room which it was authorized to keep if deemed expedient. It was further resolved that the law library "be placed for the present under the control of Wm. F. Stearns."[37]

No later reference to this collection appears in the records of the University, but presumably it survived the war intact, since that is the only reasonable explanation for the announcement in the 1866 catalog that the law library then contained "upwards of a thousand well selected volumes."[38]

This was quite adequate. In the late eighteen sixties a thousand-volume law library could easily support a law school of one professor and two dozen students. There were only seventy-three volumes of the United States Supreme Court Reports by 1867. The Mississippi Reports numbered forty-one, Tennessee forty-four, and Johnson's and Barbour's New York Reports totaled eighty-six. The United States Statutes at Large

[32]Board Minutes, July 10, 1857.

[33]Board Minutes, July 14, 1857.

[34]Board Minutes, July 9, 1858.

[35]Board Minutes, June 25, 1860.

[36]Board Minutes, June 25, 1860.

[37]Board Minutes, Oct. 2, 1861.

[38]Catalogue, Univ. of Miss., 1866-67, p. 26. None of this collection appears to be in the University of Mississippi Law Library today.

filled fourteen volumes, and the Mississippi Code was a single book. The important treatises, form books, and miscellaneous publications were not numerous, and law reviews still lay in the future.

After Lamar came to the faculty there were more additions to the collection. Complying with a request from the Board of Trustees, the legislature began furnishing ten to fifteen copies of each new volume of the Mississippi Reports.[39] The Board also requested the legislature to send a complete, bound set of the journals of both houses.[40] An appropriation of $500 was made in 1868 for United States Supreme Court Reports and "such standard elementary law works" as Lamar might select.[41] This was no doubt the best law library in the northern part of the state, and by express permission of the trustees it was made available for use by the courts.[42]

III. Curriculum and Students

During Lamar's tenure the full law course was designed to run for two years. The plan was that students in their first term would be placed in the junior class, and those in their second term in the senior class. But a student could join whichever class he preferred; he was not compelled to begin at the beginning.[43] Moreover, it apparently was permissible for a student to pursue both the junior and senior courses at the same time, although Lamar advised against this. He felt that a man would be better prepared for law practice by thoroughly mastering the junior course alone than by taking both years together and probably not mastering either.[44]

The prescribed books for the two years were as follows:[45]

Junior Year	*Senior Year*
Blackstone's Commentaries	Greenleaf on Evidence
Kent's Commentaries	Adams on Equity
Story on Bailments	Angell & Ames on Corporations
Story on Agency	Story on Conflict of Laws
Smith on Contracts	Bishop on Criminal Law
Byles on Bills	Mississippi Code of 1857
Stephen on Pleading	
Story on Partnership	

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[39]Board Minutes, Oct. 20, 1866; Letter From Lamar to R. A. Hill, Feb. 4, 1869, in the Lamar Papers (Miss. Dep't of Archives).

[40]Board Minutes, Oct. 20, 1866.

[41]Board Minutes, Sept. 25, 1868.

[42]Board Minutes, Sept. 25, 1868.

[43]Catalogues, Univ. of Miss., Dep't of Law, 1866-67, 1867-68, 1868-69, 1869-70, on file in the Univ. of Miss. Library.

[44]Rowland, Courts, Judges and Lawyers of Mississippi 215 (1935) [hereinafter cited as Rowland].

[45]Note 43 *supra*.

This was precisely the same as in the last prewar session, although moot courts were added to the curriculum by Lamar.[46] It was typical of university legal education of the day. The same course of study with only a very few differences in texts was then being offered, for example, at the University of North Carolina by Professor William Horn Battle[47] and at the University of Virginia by Professors John B. Minor and Stephen O. Southall.[48] And at far-off Harvard the same books were being used by Theophilus Parsons, Joel Parker, and Emory Washburn in a similarly disorganized two-year curriculum.[49] Of the thirty-one law schools in the United States by 1870, only twelve had a program running as long as two years.[50]

Here in thirteen different works, the great legal texts of the nineteenth century, plus state and federal statutes, was the entire corpus of the law to be taught by Lamar alone. The list suggests a departure from the spirit of the 1854 report that the school be one of governmental science as well as law. But this was a national pattern. The law schools originally modeled on Jefferson's idea, generally those in the South, had drifted by the eighteen sixties away from those broad notions and had become practitioner's schools offering a technical legal curriculum like the northern schools.[51] The emphasis was on the basic common law, private law subjects. *Kent's Commentaries*, however, did furnish material for broader instruction, such as its Part I, "Of the Law of Nations," and Part II, "Of the Government and Constitutional Jurisprudence of the United States." While *Kent* and *Blackstone* apparently were the most heavily used texts, it is unclear how much attention Lamar actually gave to public law, although as suggested hereafter it may have been more than the prescribed books reveal. In any event, he was compelled to devote some thought to international law because he was made responsible for instructing it to the college students.[52]

A total of 54 individuals studied law under Lamar during his four years on the faculty.[53] The annual junior and senior enrollment in law and the total University enrollment were as follows:[54]

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[46]Catalogue, Univ. of Miss., 1860-61; MAYES 125-26.

[47]WETTACH, A CENTURY OF LEGAL EDUCATION 22-24 (1947).

[48]Catalogue, Univ. of Va., 1867-68, pp. 31-32.

[49]Howe, *Oliver Wendell Holmes at Harvard Law School*, 70 HARV. L. REV. 401 (1957).

[50]REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 171 (1921).

[51]*Id.* at 154-59.

[52]Catalogue, Univ. of Miss., 1866-67, p. 27.

[53]HISTORICAL CATALOGUE 106-08.

[54]MAYES, HISTORY 146. There is a discrepancy between Mayes and Waddel on the enrollment figures for three of these sessions. The latter shows 1 law student for 1866-67, 13 for 1868-69, and 15 for 1869-70. See WADDEL 300.

Session	*Jr.*	*Sr.*	*Total in Law*	*University Total*
1866-1867	18	1	19	246
1867-1868	10	14	24	231
1868-1869	15	11	26	214
1869-1870	7	15	22	208

The lone graduate in the first session was Charles Bowen Howry of Oxford, son of one of the University trustees. He commenced practice in Oxford, and in later life was a judge on the United States Court of Claims.[55] Of the 24 law students enrolled in the 1867-68 session 12 graduated, and in Lamar's last two sessions there were 10 and 15 graduates respectively.[56] Thus there were a total of 38 graduates out of the 54 law students in the four-year period. Whether the remainder failed the course or whether they simply withdrew before pursuing sufficient work to graduate does not now appear. It is also unclear how many attended two years or only one year. About a third of all Lamar's students had been in the Confederate military or naval service.[57]

The times were not conducive to a University education. The social upheaval was accompanied by an economy which was at near-bottom. Able-bodied men were needed at home to raise crops or otherwise provide for their families. There was no "Marshall Plan" or "G. I. Bill." The annual tuition of $50 came hard. In more than one case Lamar himself paid this. A notation to that effect appears by the names of numerous law students in the University fee book.[58] One of them happened to be a future Congressman—the colorful "Private" John Allen.[59] In covering tuition Lamar was simply writing off money he otherwise would have received, because the professors at that time were entitled to the tuition paid by their students, in addition to their salaries.[60] But of course for the student this was scholarship aid in a very real way. Lamar and his wife also had students living and eating at their home. The father of one wrote Lamar for a report on how his boy "is getting on, how is he progressing with his studies, how is his health in fact all about him and most especially as to his moral habits."[61]

A visitor to the University at this period noted that about half the students could afford the usual college expenses and boarded at the Commons, a University dining hall. The others, mostly army veterans,

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[55]Historical Catalogue 106; Waddel 464; Rowland 156-78.

[56]Waddel 464; Historical Catalogue 106-08; Mayes, History 146.

[57]Historical Catalogue 106-08.

[58]Ledger of Students Matriculated at Univ. of Miss., 1865-1873, on file in the Univ. of Miss. Library.

[59]*Ibid.*; Rowland 186-95.

[60]Board Minutes, June 18, 1863, June 2, 1870.

[61]Letter from H. G. Brown to Lamar, Jan. 2, 1867, in the Lamar Papers (Miss. Dep't of Archives).

"now keep up the practical habits of their soldier life; draw their rations from home, or buy them in bulk, and have their little messes as in the anxious times now three years gone. These young gentlemen have no negro servants now but they hew their own wood and in all respects conform to the hardy habits of the Confederate soldier."[62] The Memphis paper likewise noted this, reporting further that the "students are more moral and studious than any previous set" and that "there has not been the least disturbance in the college during this session; no rebellion, no fighting, no drinking, nor any deportment but that of dignified and genteel young men."[63] To Lamar and Chancellor Waddel this must have presented an interesting contrast to the disorders of the previous decade when the young men, equipped with firearms and personal colored servants, delighted, among other antics, in buying whiskey off cotton wagons coming back from Memphis.[64] Despite these glowing reports of good deportment there were rumors abroad about "wild and reckless" students, and in 1868 Waddel felt the need to publish a statement of his own assuring the people of the state that order and morality did prevail.[65]

Of Lamar's students who were veterans most had been soldiers in the ranks since they were quite young during the war; however, one was a lieutenant in the Navy, at least two were army captains and one an army lieutenant. Nearly all were Mississippians. A number scattered later, but probably over half spent their careers chiefly in the home state. Several went to Texas and Tennessee. Some, though fewer, turned up later in Alabama, Arkansas, California, and Colorado. And eventually one could be found in Georgia, Louisiana, the State of Washington, and the Indian Territory. At least seven served in state legislatures, six as judges of state courts, and two as professors of law. From the group also came a bank president, a railroad president, a United States Attorney, a Chancellor of the University, a judge of the Court of Claims and two members of Congress—John M. Allen and Chapman Levy Anderson.[66]

The future Chancellor was Edward Mayes who married the professor's oldest daughter, Frances Eliza, while he was still studying law.[67] Lamar at that time thought Mayes handsome and talented, but doubted that the marriage of persons "without any means of supporting themselves in comfort, can be a judicious step."[68] It is possible that, with

[62]The Oxford Falcon, Dec. 21, 1867.

[63]The Oxford Falcon, June 8, 1867, quoting from the Memphis Appeal.

[64]WADE, AUGUSTUS BALDWIN LONGSTREET 297 (1924); WADDEL 269-71.

[65]The Oxford Falcon, Sept. 5, 1868.

[66]Compiled from information in HISTORICAL CATALOGUE 106-08.

[67]The Oxford Falcon, May 15, 1869.

[68]Letter From Lamar to Mrs. Fanny Paine, April 20, 1869, in the Lamar Papers (So. Hist. Collection, Univ. of N. C. Library).

an eye to remedying this, Lamar had something to do with Mayes' being appointed librarian at the University a few months later.[69] Mayes eventually became Lamar's law partner and later filled his father-in-law's old spot as law professor.[70] Another of the professor's future law partners among his students was Harris Parke Branham, the son of Mrs. Lamar's sister.[71]

A few of these men had been in the academic department before beginning law study, but most had no prior college. As in American law schools generally, formal standards for admission were not high. An applicant had to be at least 19 years old and, if not a college graduate, to "exhibit satisfactory testimonials of good moral character." No previous study was required, and no entrance examination was administered. The catalog stressed that there were advantages in studying law at a professional school rather than in a law office, and it urged the desirability of attending the state law school for those intending to practice in Mississippi.[72]

The main work Lamar assigned his students was reading in the prescribed texts. Dabney Minor Scales of Holly Springs, a young instructor in French who was also studying law, wrote a friend:

> Macaulay's Miscellanies is light French literature compared with Kent's Com. and parts of Blackstone. But I rejoice to say that—by main strength and stupidity though it be—I am at length able to clear my way through this jungle of incongruities at a rate that is much more satisfactory. Still it requires hard work. . . . Even now, Sunday night as it is, I have some thirty or forty pages in Kent to master. . . .[73]

These reading assignments were made daily. There was then an oral examination at each meeting of the class on the assigned material.[74] Considering the small enrollment it was not impracticable for Lamar to interrogate each student rather thoroughly. In addition, he lectured regularly. According to Edward Mayes, an admiring son-in-law, Lamar had "a power of analysis, generalization, and elucidation" which cut through the law's obscurities; he was able to clarify intricacies "such as conditions and limitations in deeds, executory devises, contingent remainders, and the exact boundaries between the law and equity."[75] About his lectures it was also said: "He has the happy faculty of being able to explain clearly and succinctly the great principles of jurispru-

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[69]Faculty Minutes, Oct. 4, 1869.

[70]ROWLAND 178-82.

[71]HISTORICAL CATALOGUE 107; The Oxford Falcon, March 8, 1872.

[72]Note 43 *supra*.

[73]Letter from D. M. Scales to Loulie Irby, April 7, 1867, in DEAR DARLING LOULIE (copyrighted by Ben Gray Lumpkin, 1955), copy on file as Cordelia L. Scales Letters in So. Hist. Collection, Univ. of N. C. Library; Catalogue, Univ. of Miss. 1866-67.

[74]Note 43 *supra*; The Oxford Falcon, Aug. 10, 1867.

[75]MAYES 125.

dence so that the dullest intellect will comprehend them."[76] Besides examining students and lecturing, another teaching device used by Lamar was the designation of a particular student to give the substance of the day's lecture at the next meeting of the class, subject to questioning by the other students. This was designed to serve a dual purpose: to increase attention to the professor's lecture, and to give individual students practice in discussing legal questions.[77]

The moot courts were Lamar's innovation. He worked up the cases to be tried by the students, placing them hypothetically in both state and federal courts. He usually presided as judge, while the students served as the attorneys, clerk and sheriff. This was a popular weekly feature of the curriculum, supplementing the regular work.[78]

Time has washed over further details of how and what Lamar taught. For example, the extent to which he required the reading of reported opinions in addition to the textual assignments is not known. The assertion that he instituted something like the modern case system cannot presently be established.[79] That he did is of course possible, but nothing in the currently available evidence so indicates. In fact one ex-student said that during his year under Lamar he studied only the four volumes of *Blackstone's Commentaries*; however, he felt that he "fairly mastered" them.[80] This suggests that a student may not have been compelled to study all texts or subjects prescribed for a given year. Although there was a final examination at the end of the session, this may well have been oral and given as a kind of group quiz. Reporting on it one spring, through the eyes of a layman, the newspaper stated: "Questions of the most difficult nature were prepounded and answered in a manner which showed that the students had been diligent in their studies."[81]

If the whole arrangement seems to have been loose it was no more so than in other law schools of the time. Professional training in law as a part of higher education was still in its infancy. Much if not most legal education continued to be in the law offices. There were no published teaching materials. The informality is further revealed

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[76]The Oxford Falcon, Jan. 16, 1869.

[77]MAYES 125.

[78]Note 43, *supra*; MAYES 125-26; Letter from D. M. Scales to Loulie Irby, Oct. 14, 1867, in DEAR DARLING LOULIE, note 73, *supra*.

[79]The assertion appears in CATE, LUCIUS Q. C. LAMAR 123-24 (1935), but none of the cited material supports it. No books or notes used by Lamar in teaching have been located. A search in 1961 of the University of Mississippi Law Library disclosed only one book which seems to have belonged to Lamar. It is an 1838 edition of Vol. 2 of *Blackstone's Commentaries* which bears the notation inside: "L. Q. C. Lamar, Oxford, Miss., Jan. 28, 1871." That date is after he had left teaching.

[80]ROWLAND 215.

[81]The Oxford Falcon, May 8, 1869.

by the stated requirement for graduation: "Those only will be graduated who have passed through the entire course of study here prescribed, or whose legal attainments entitle them, in the opinion of the law faculty, to a diploma."[82] Since Lamar alone was the law faculty, this left it to him to say who could graduate regardless of the length or content of the course taken.

The sessions of the University ran from mid-September to late June. There was no summer school. Once, however, in the summer of 1869, several law students stayed at Oxford and Lamar gave them a series of lectures, apparently on an informal basis.[83]

During Lamar's professorship the University of Mississippi Law School was one of nine law schools in the states of the former Confederacy.[84] All of them except the University of Virginia had been closed during the war. Lamar in his four years drew only a few more than half as many students as had come to Oxford to study law in the same period before the war, but this was a relatively good showing. The two most prominent southern schools had lost substantial ground though each still had larger enrollments than Mississippi. Cumberland in 1859-60 had an enrollment in law of 180, highest in the nation. Now, its buildings burned, it had about 74 students. From third in size nationally, Virginia had dropped to sixth place but still attracted 109 law students in the 1869 session. The northern law schools, on the other hand, had leaped forward. Michigan had come from far down the line to first with more than 300. Columbia, with 62 enrolled before the war, was now second with well over 200 studying under Theodore W. Dwight and three other professors.[85]

IV. Lamar as a Teacher

For a law teacher, character, personality, and learning are more important than method or technique or the imposition of formal requirements on students. The teacher's worth and effectiveness are determined at least as much by what he is as by what he does or how he does it. Thus despite the laxness in formal standards and curriculum it is quite likely that Lamar was successful as a law professor because of what he was.

Physically, he was of medium height, with a stocky, powerful build

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[82]Note 43 *supra.*

[83]The Oxford Falcon, July 24, 1869.

[84]Reed, Training for the Public Profession of the Law 423-30 (1921). The others were the University of Virginia, University of Georgia, University of Louisiana (later Tulane Univ.), Cumberland, Baylor, Washington College (later Washington & Lee Univ.), University of South Carolina, and Trinity College, N. C.

[85]*Id.* at 451-52. For a picture of Columbia Law School at that time see Legal Studies of the William Nelson Cromwell Foundation, A History of the School of Law Columbia University 57-67 (1955).

and long brown hair flowing back to his collar. He had a soulful look, "a capacious head, and a mouth large enough to tell its own story."[86] Though often moody and dreamy, he displayed a "flashing eye" on the platform.[87] To one of the young men Lamar had a "magnificent presence," a "strange magnetism."[88] In later years a writer summed up a consensus he found among former students: "Colonel Lamar was superior to other men; he was so grand."[89]

His impact on people seems to have come from a colorful personality combined with those qualities clustered under the label of character. Lamar was a man who held strong views on honor and morality. He often spoke in those terms, using them to judge events and weigh proposed courses of action. The public service to him was a sacred trust. "Ask any Mississippian," commented an observer, "who knew Lamar personally, to explain his hold upon his people . . . and you will be told that it was the grandeur of the man, intellectually and morally, that wooed and won them."[90] Lamar himself once said that "strength of mind and force of character are the supreme rulers of human affairs."[91] In his famous Senate speech declining to follow the Mississippi legislature's instructions to vote for the silver bill, eight years after he resigned the law professorship, he spoke of his work in helping to educate the youth of his state, and said: "Upon them I have always endeavored to impress the belief that truth was better than falsehood, honesty better than policy, courage better than cowardice."[92]

Even allowing for the sentimental exaggeration of the nineteenth century, the available evidence, though fragmentary, still indicates that Lamar was probably effective in doing at least two things a law professor should do—stimulating a desire to learn and instilling appropriate ethical notions. He "stirred many a noble impulse," according to one of his students.[93] He spent little time with trivialities, but "discussed only great themes—questions that were vital to the nation, questions that inhered in the very structure of our government."[94] On the whole, the evidence also suggests that after all, despite the appearance of the officially stated course of study, Lamar may have conducted a kind of broad-gauged school of governmental science more

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[86]The Oxford Falcon, June 19, 1869.

[87]GALLOWAY, GREAT MEN AND GREAT MOVEMENTS 198 (1914).

[88]*Ibid.*

[89]Leftwich, *Lucius Q. C. Lamar*, THE METHODIST REVIEW, Vol. 44, pp. 71-72 (Sept.-Oct., 1896).

[90]*Id.* at 67-68.

[91]MAYES 801.

[92]7 CONG. REC. 1061 (1878).

[93]GALLOWAY, *supra* note 87, at 198.

[94]*Id.* at 223.

or less in the Jeffersonian tradition. His background makes this likely. He had received no formal training in law, only a law office apprenticeship in Macon, Georgia, following his graduation at Emory. Moreover, he had practiced law rather intermittently. His interest and time had been directed chiefly to public affairs. Before the war he had served in the Georgia legislature and two terms in the national House of Representatives. His major efforts for the Confederacy had been of a political nature, both at home and in Europe. By his whole experience, he was probably oriented much more to public issues than to private law problems.

In personality Lamar was a curious figure. Apparently he could move among people and be unaware of their presence. He might sometimes pass a close friend on the street and show no recognition; the very next day, however, he might embrace him warmly.[95] He was spoken of as aloof, lonely, and philosophic. Chief Justice Fuller was to note about him as a Supreme Court Justice "a certain Oriental dreaminess of temperament" as well as an "undoubted intellectual power."[96] Though repeatedly successful in elections he was not a handshaker or gregarious mixer in crowds.[97] His moods were highly variable. At one point he might be despondently detached; at another he might be engaged in animated conversation. He could be a distinct attraction at social gatherings. Out of his heterogenous experiences he had an endless store of anecdotes and stories, frequently involving jokes on himself. Women were clearly drawn to him, doubtless by the flirtatious flattery which he rarely failed to employ. Mrs. Burton Harrison spoke of the "witchery of his presence."[98] With this peculiar mixture of introverted dreaminess and attractive wittiness he could also be galvanized into action, physically and mentally. Nobody ever pushed Lamar around. Numerous times he displayed raw physical courage in an era when controversies easily reached the physical stage. Lamar was not a bully, nor was he anxious to fight; but he never ran from a threatened encounter. As he once put it in a heated moment to another Senator: "You are always talking about fighting, but never fight; that's where you and I are a good deal unlike. I don't talk about fighting, but I am ready for it any time."[99]

Here then was a man who could hardly fail to fascinate and stimulate a group of college boys interested in the law. His experiences alone were enough to excite their interest—lawyer, congressman, author of the secession ordinance, infantry colonel, diplomat in Europe, mem-

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[95]Leftwich, *supra* note 89, at 67-68, 71-72.

[96]*In Memoriam*, 148 U.S. 707, 710, 711 (1893).

[97]Leftwich, *supra* note 89, at 67.

[98]Mrs. Burton Harrison, Recollections Grave and Gay 160 (1912).

[99]Mayes 392.

ber of a military court, acquaintance of nearly all those who were or had been in high public office. That coupled with his character, unusual personality, and genuine ability would seem to be a near guarantee of success in the lecture room.

One piece of evidence as to Lamar's popularity among the universilty students generally is the fact that he was initiated into the Sigma Alpha Epsilon fraternity when a chapter was organized there.[100]

V. University Affairs

Lamar evidently found his professional colleagues congenial enough. In addition to Waddel, who taught political economy and evidences of Christianity, the faculty consisted of Gen. Claudius W. Sears, the mathematics professor who had lost a leg in the war, the Rev. John J. Wheat in Greek, and the Latin Professor A. J. Quinche who had been left as wartime custodian of the University buildings and was partially credited with saving them from destruction because he had once lived in Galena, Illinois, and knew Grant.[101] At about the time Lamar began teaching, Gen. Francis A. Shoup was appointed to the chair of physics, astronomy and civil engineering, and the Rev. S. G. Burney to the chair of English literature.[102] In 1867 Dr. Landon C. Garland, coming from the presidency of the University of Alabama where he had been burned out by federal troops, joined the faculty and took over physics and astronomy. Eugene W. Hilgard, the German geologist who had been in the state for a number of years, was named to the chair of chemistry and natural history.[103] As indicated by their titles, the group was preponderantly military and ministeral. Lamar seems not to have formed the kind of close friendship with any of these men as he had with Chancellor Barnard and with his senior in mathematics, Albert Taylor Bledsoe, while on the pre-war faculty. With Garland, however, he did have continuing contact later when they were both connected with Vanderbilt—Garland as Chancellor and Lamar as a trustee.

During the regular session the faculty met weekly, with Waddel presiding. The meetings were largely devoted to student problems, academic and disciplinary. Despite the relatively good student behavior there were individual cases of bad deportment. Questions concerning the law school and its students rarely came before the whole faculty.[104] This was no doubt the result of the University rule that in matters of discipline among law students the law professor would exercise exclu-

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[100]Cate, Lucius Q. C. Lamar 126-27 (1935).

[101]Waddel 447; Cabaniss, A History of the University of Mississippi 67-70 (1949).

[102]Waddel 456; Cabaniss, *supra* note 101, at 70.

[103]Waddel 460-61; Cabaniss, *supra* note 101, at 71.

[104]Faculty Minutes, Sept. 1866-June 1870.

sive jurisdiction. Moreover, it was provided that "the law students are not subject to any of the disciplinary regulations of the University, other than such as related to moral conduct.[105] The law school seems to have been a kind of independent domain under Lamar. No record has been located concerning his disciplinary or administrative problems.

The weekly faculty meetings were attended by Lamar only sporadically, particularly in the session of 1868-69 when he was resuming law practice and other activities. He held the position of faculty historian, but this seems to have amounted to nothing.[106] In fact at the beginning of the 1869 session the faculty voted not to continue such a position and to bring the matter to the trustees' attention so that the office might be reorganized and "made more productive of practical results."[107]

The academic year was closed every June by commencement exercises lasting several days. Large crowds, including many young ladies, were attracted from all over the state and from Memphis. There was a mixture of preaching, student oratory, distinguished guest speakers, the awarding of prizes, and social events culminating in a grand ball.[108] At the commencement of 1869, apparently for the first time, the law class was given a separate place in the ceremonies.[109]

To fill part of the law school's role that June Lamar arranged to have Wiley P. Harris, of the Jackson Bar, deliver an address to his graduates. Lamar and Harris had been associated in the pre-war states rights party, and at the 1861 convention Harris had been on Lamar's committee which drafted the secession ordinance. By 1869 he had come to be recognized as a leader of the Bar.[110] The Trustees who were generally of the same political leanings were sufficiently impressed with his talk to order a thousand copies printed.[111] The theme can be gathered from the following excerpts.

> Systematic and comprehensive legal education—broad, liberal, accurate, and profound—is of great public importance in this country, owing to the structure of our government. One of the three great departments into which government is divided by the constitutions of all the states and of the United States, is confided to the legal profession exclusively. The performance

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[105]Catalogues, Univ. of Miss., Dep't of Law, 1866-67, 1867-68, 1868-69, 1869-70 on file in the Univ. of Miss. Library.

[106]*Ibid.*

[107]Faculty Minutes, Oct. 4, 1869.

[108]Letter from D. M. Scales to Loulie Irby, April 28, 1867, June 12, 1867, in DEAR DARLING LOULIE, note 73 *supra*; The Oxford Falcon, July 11, 1868, June 5, 1869, June 25, 1870.

[109]Board Minutes, Sept. 25, 1868.

[110]ROWLAND 267-70.

[111]Board Minutes, June 21, 1869.

> of the functions of that department requires educational training, which no moral or intellectual endowments, however great, can supply; and these high functions bear such relation to the whole scheme of government, that all else is in an essential manner dependent on them.
>
> . . . You propose to enter this profession. In doing so, you offer yourselves as the future judges of great commonwealths, and the advisers of judges. While, therefore, you propose something for yourselves, you propose a great deal for us, the people at large. Let us consider what it is. . . .[112]

And he went on to discuss the role of the lawyer in Anglo-American society.

The law students from time to time heard other speakers. For example, Lamar brought in Judge Alexander M. Clayton from Marshall County to address them.[113] Before the war he had been on the state high court and had revised the state code. He was a University trustee and, like Wiley P. Harris, had served on the secession ordinance committee with Lamar. Now, after the war, he was on the state circuit court, though shortly to be removed from office by the military authorities.[114] William Yerger, another prominent Jackson lawyer, also spoke to the law students.[115] But not all the visiting speakers had such professional standing. Once a local politician appeared before the law students to urge preparations for a war of the races, but he does not appear to have had Lamar's sponsorship.[116]

VI. Activities Non-Academic: Speeches and Law Practice

Lamar made no attempt to seek political office during the four years he taught law, nor did he engage in any substantial political activity. "Most of the old knights are disposed to enter the lists again," he said after he had been teaching a year, but "I have made no sign 'although often thereunto requested'."[117] He felt that those, like himself, who had led the country to disaster should not seek to lead again. "I, at this time, look on without hope and without passion."[118]

Although the period of his law professorship was one of relative quiet in his personal and political life, especially the first two years,

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[112]Address to the Graduating Class in the Dept. of Law, Univ. of Miss., June 23, 1869, by Wiley P. Harris (Printed by Order of the Trustees, Jackson, 1869) (Univ. of Miss. Library).

[113]Board Minutes, June 23, 1868.

[114]The Oxford Falcon, Feb. 20, March 20, 1869.

[115]Board Minutes, June 24, 1868.

[116]The Oxford Falcon, Nov. 1869.

[117]Letter From Lamar to Burton Harrison, Aug. 13, 1867, in the B. Harrison Papers (Library of Congress).

[118]*Ibid.*

Lamar did get around and make some public appearances. In 1867 he was elected to the Board of Directors of the Mississippi Central Railroad and thereafter attended its meetings, usually held just down the line at Water Valley.[119] What seem to have been his only purely political speeches came in June 1868, when he spoke at mass meetings in Oxford and Water Valley along with Gov. Humphreys and other Democrats.[120] He was one of several speakers at a four-county reunion of Confederate veterans that summer,[121] and a little later he gave the main address at an agricultural and mechanical fair in Water Valley.[122] He was a riding contest judge in the "Grand Tournament" held from time to time in Oxford, with the Memphis band and much fanfare, to raise money for the cemetery.[123]

In the spring of 1869 Lamar had a central part in an exciting local event—the return of Jacob Thompson from exile in Europe. Thompson, the district's former Congressman, one-time president of the University Trustees, Secretary of the Interior under Buchanan, and a man of considerable wealth, had long been Oxford's most prominent citizen.[124] Advance publicity had been given his arrival, and by the time the evening train pulled in a brass band and quite a crowd had gathered at the depot. On the station platform in the April dusk Lamar made an hour-long welcoming address. It was a nostalgic occasion, and enthusiasm ran high. Following Thompson's response, he and Lamar stepped into a waiting carriage. At that point several dozen University students exuberantly surged forward, unhitched the horses, and pulled the two distinguished gentlemen through town to a reception and banquet.[125]

A few weeks later, shortly before commencement, Lamar went to Jackson, Tennessee, to speak to the Female Institute. He appropriately picked the subject of female education, urging that it be put on the same level as education for men, as he saw "no generic difference between the mind of man and woman." In concluding his hour-and-a-half presentation, a not uncommon length for the day, he shifted to

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[119]The Oxford Falcon, Oct. 19, 1867.

[120]The Oxford Falcon, May 16, 1868.

[121]The Oxford Falcon, July 11, 1868.

[122]The Oxford Falcon, Sept. 1868.

[123]The Oxford Falcon, June 8, 1867, Sept. 7, 1867.

[124]CLAIBORNE, MISSISSIPPI AS A PROVINCE, TERRITORY AND STATE 447-66 (1880). In 1860 Thompson owned 2,500 acres in Lafayette County on which he produced 391 bales of cotton and 5,500 bushels of corn. Hathorn, A Period Study of Lafayette County From 1836 to 1860 (unpublished thesis in Univ. of Miss. Library, 1939). He was the largest single cotton producer in the county that year. His home, the largest in Oxford, had been burned by federal troops. Deupree, *Some Historic Homes of Mississippi*, 6 PUBLICATIONS OF THE MISS. HIST. SOC'Y 245, 261 (1902).

[125]The Oxford Falcon, May 1, 1869, April 24, 1869; CABANISS, A HISTORY OF THE UNIVERSITY OF MISSISSIPPI 77 (1949).

the South's plight, a problem constantly in his thoughts, and predicted "ultimate triumph in our efforts to preserve the jewel of constitutional liberty."[126] Female education was not a new subject for Lamar, as he had talked on it at the Ladies Literary Society in Oxford the year before, a talk characterized as "one of his happiest efforts."[127]

Lamar's gradually increasing activity in speech making, from 1868 on, was paralleled by a build-up in his law practice. When he accepted the faculty appointment in 1866 and moved back to Oxford from Coffeeville he had not intended to abandon practice entirely.[128] But in fact he did so for nearly two years, until the spring of 1868. His re-entry into litigation came then when he was engaged to represent defendants in four related cases filed in the federal court. In two of them the plaintiff's attorney was his former student, Charles B. Howry. The suits were all to collect debts arising out of commercial transactions. Their outcome leaves it doubtful who really won. Although Howry obtained judgments for $500 in both his cases, he had asked $5,000 in one and $1,500 in the other. In the third case, $3,000 was demanded, and there was a $500 plaintiff's verdict. No judgment was ever entered in the fourth.[129] While still law professor, Lamar had only three other cases in federal court, all equity actions, and he represented the respondent in each.[130] On at least one occasion while on the faculty he appeared before a United States military commission to defend a white man on a charge of murdering a negro woman.[131]

During the summer of 1868 Lamar formed a partnership with E. D. Clark, a young Oxford lawyer.[132] Noting the announcement of this, the newspaper said: "The fact that Mr. Clark is associated with Col. Lamar is a sufficient guarantee of his ability and integrity."[133] When September came around Walthall, writing Lamar "to learn what sort of a law class you have," commented: "I understand you are getting some good cases. I have never had any doubt about your getting a

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[126]The Oxford Falcon, June 19, 1869.

[127]The Oxford Falcon, Feb. 22, 1868.

[128]MAYES 124.

[129]J. S. Morris & Sons v. Chilton, No. 2802 (filed March 9, 1868), Sutcliffe, Owen & Wood v. Chilton & McPherson, No. 2803 (filed March 9, 1868), J. M. Robinson & Co. v. Chilton & McPherson, No. 2809 (filed March 27, 1868), Howell, Wood & Co. v. Chilton & McPherson, No. 2833 (filed May 8, 1868), U. S. District Court, N. D. Miss. (Federal Records Center, East Point, Georgia).

[130]Dickens v. Maynard, No. 138 (filed Aug. 7, 1868), Robinson v. Bowles, No. 141 (filed Nov. 4, 1868), Hickman v. Edmonson, No. 161 (filed March 31, 1870), U. S. District Court, N. D. Miss. (Federal Records Center, East Point, Georgia).

[131]Letter From Lamar to C. C. Clay, July 14, 1869, in the C. C. Clay Papers (Duke Univ. Library).

[132]The Oxford Falcon, Aug. 8, 1868.

[133]*Ibid.*

hand in all the good cases in your region, when you get fairly to work."[134] From then on his practice increased. In the following summer he reported an "unexpected influx" of business though "not all remunerative."[135] By 1870 he felt he had reached the point where he could support his family without his University salary.[136]

VII. The Law and the Federal Court

The times were dramatic, unique. During the years Lamar was on the University faculty Mississippi had no Senators or Representatives in Congress; the State had not been "readmitted." Most of this period it was under military government. For a law teacher there was much to brood about and discuss—questions of constitutional theory as well as a multitude of unprecedented private law problems. What was the constitutional position of the late Confederate States and of their inhabitants? If the southerners were still citizens, to what extent could they be deprived of civil rights and placed under disabilities? What validity was there to the multitude of private transactions and official acts carried on in the South during the war years? What was the legal relation between the United States military governor in Mississippi and the state government, including the state courts? These were some of the issues left in the wake of the war and raised after the spring of 1867 by military government under the Reconstruction Acts. The political developments were accompanied by less publicized litigation in the courts. For people in Oxford and at the University, the weekly newspaper, *The Oxford Falcon*, gave unusually full coverage to national and state affairs, particularly to legal matters, and often published the full texts of documents pertaining to Reconstruction, such as presidential proclamations, acts of Congress, military orders, and court opinions. It provided a kind of advance sheet service on current legal problems stemming from the war and its aftermath.

Many of these undoubtedly interested Lamar and the law students. There was, for example, the question of the admissibility of the testimony of negro witnesses, one of the much discussed problems concerning the status of the former slaves; negroes previously had been legally incompetent to testify.[137] In 1866 Circuit Judge J. A. P. Campbell, sitting in Attala County, allowed negro testimony in the trial of a

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[134]Letter From Walthall to Lamar, Sept. 21, 1868, in the Lamar Papers (Miss. Dep't of Archives).

[135]Letter From Lamar to C. C. Clay, July 14, 1869, in the C. C. Clay Papers (Duke Univ. Library).

[136]Mayes 126-28.

[137]Garner, Reconstruction in Mississippi 94-95 (1901).

white man for murdering a negro, explaining his ruling at length in an opinion which was published in the paper.[138] In another case, *Nordlinger v. Vaiden,* tried in the federal court at Oxford, suit was brought on a note which provided for payment in Confederate treasury notes. After extensive argument, Judge Robert A. Hill held the note void, and the paper printed his opinion in full.[139] Still another interesting legal point was involved in *Miller v. McKenzie,* tried in the federal court in Oxford in 1867, where the plaintiff sued an army officer for burning 500 bales of cotton in 1862. This was also covered in the *Falcon.*[140] At the same term of court Judge Hill sustained the legality of promissory notes given before the war for slaves.[141]

Judge Hill quickly became a key figure, and Lamar of course knew him well. He had been a Mississippi probate judge during the war and was appointed to the United States Court on its reactivation in 1866. As the only federal judge in the state he played the leading judicial role during Reconstruction. Much of his work was at Oxford where he took up residence.[142] After military government was established under the Reconstruction Acts of 1867[143] numerous habeas corpus cases were brought before him by persons taken into military custody. He refused to release any of them, although he admitted many to bail pending trial.[144] Perhaps his two most celebrated decisions, made while he was sitting in Jackson but reported at length in the Oxford paper, were in the *McCardle* and *Yerger* cases. There he upheld the constitutionality of military government under the Reconstruction laws. The *Falcon* later advertised printed copies—a "neat pamphlet of 122 pages"—of Yerger's trial before the military commission and his habeas corpus proceedings in the federal court.[145] Both the *McCardle* and *Yerger* cases were taken to the Supreme Court, but the Court ultimately avoided passing on the fundamental question Judge Hill had decided,[146] a question of intense interest to Lamar and everyone in the South. Hill was the judge who in 1871 disbarred Lamar and then reinstated him shortly thereafter.

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[138]The Oxford Falcon, Sept. 20, 1866. Campbell had admitted negro testimony in a different type of case a year earlier and had rendered a similar opinion. GARNER, *supra* note 137, at 117.

[139]The Oxford Falcon, June 8, June 15, 1867.

[140]The Oxford Falcon, Dec. 21, 1867.

[141]The Oxford Falcon, Dec. 21, 1867.

[142]9 DICTIONARY OF AMERICAN BIOGRAPHY 44-45 (1932).

[143]14 Stat. 428 (1867).

[144]Minute Book No. 5 (Vol. 71), U. S. Court, N. D. Miss., Dec. 16, 1867, June 16, 1868, July 29, 1869 (Federal Records Center, East Point, Georgia).

[145]The Oxford Falcon, Sept. 25, 1869.

[146]Ex parte McCardle, 7 Wall. 506 (U.S. 1869); Ex parte Yerger, 8 Wall. 85 (U.S. 1869).

The incident was to be aired in the Supreme Court confirmation fight sixteen years later.[147]

The federal court in Oxford brought not only Judge Hill as a resident and a lot of important litigation, it also attracted lawyers. The top men in the bar from all over Mississippi, from Memphis and some from more distant points came to Oxford for the two annual sittings of the court. From towns in the nothern part of the state such as Holly Springs, Pontotoc, Aberdeen, and Coffeeville almost all the attorneys were routinely present.[148] Regularly on hand were such figures in Mississippi history as Gen. J. Z. George, Gen. Edward C. Walthall, and James L. Alcorn, all three, like Lamar, future United States Senators.[149] At the June term, 1869, Daniel W. Voorhees, the Democratic congressman and later Senator from Indiana, was there to try a suit against an insurance company.[150] The size of the bar practicing in the federal court is indicated by the orders of admission to practice entered in June 1867. Eighty attorneys, including Lamar, were admitted at that time, plus forty-eight others who were readmitted, "The record of their admission heretofore made having been lost or destroyed."[151] This influx of lawyers for a week or two every spring and winter was usually the occasion for much political discussion and speech making.[152] For the law students it was something of a legal and political pageant. For Lamar it afforded an opportunity to stay in contact with the thinking of this influential group. It was preponderantly a Democratic group. With the exception of Alcorn and a few others, these lawyers converging on Oxford twice a year were dedicated to ousting the Republican Reconstruction regime.

VIII. Reconstruction and the Law Professor

Despite defeat and desolation, for a short while after he came home from Appomattox Lamar had been optimistic.[153] People were busying themselves with rebuilding, and Andrew Johnson's policy gave hope for an early restoration of the state to its normal relations with the federal government. Under Sharkey's guidance as provisional governor a convention was held, a state constitution adopted, a permanent

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147Minute Book No. 6 (Vol. 90), U. S. District Court, N.D. Miss., June 23, July 5, 1871 (Federal Records Center, East Point, Georgia); Mayes 131-35.

148The Oxford Falcon, June 7, 1866, June 8, 1867, Dec. 21, 1867, Nov. 7, 1868.

149*Ibid.*

150The Oxford Falcon, June 5, June 19, 1869; Biographical Directory of the American Congress 1958 (1950).

151Minute Book (Vol. 71), U. S. Court, N.D. Miss., June 3, 1867 (Federal Records Center, East Point, Georgia).

152E.g., The Oxford Falcon, June 8, 1867.

153Mayes 119.

governor and United States Senators—Sharkey and Alcorn—elected.[154] In all this Lamar was a mere observer, barred from voting. For, although Johnson was relatively liberal in offering amnesty by his proclamation in May 1865, Lamar was excluded on two grounds: having been a diplomatic officer of the Confederacy and having left a seat in Congress to aid the rebellion.[155] The first signal of dark times ahead came in December 1865, when Congress convened and refused to seat any southerners but instead created the famous Joint Committee on Reconstruction. From then on it became increasingly evident that the President could not prevail with his quick, liberal plan for reuniting the country.

With this turn in events, Lamar, often despondent anyway, lost hope for the future. One of the things which distressed him was that months after the war ended three of his closest associates, politically and personally, were still in prison—Jefferson Davis, C. C. Clay, and Burton Harrison. He wrote letters and got up petitions for their release. After he went on the faculty he raised nearly $500 for Davis from among the students,[156] an impressive feat considering the widespread poverty. Lamar himself was not economically destitute, but he saw hard times. He had to reconvey eleven hundred acres he had acquired from Judge Longstreet just before the war because he was unable to pay anything on the purchase price.[157] Out of the Coffeeville practice with Walthall he had made a few hundred dollars but lost it when an Oxford bank failed in the following year.[158] After two years of teaching he found that his University salary of $2,000 could not support his family. That was no doubt one of the reasons why he took up law practice again in 1868.[159]

But over-shadowing all this, from 1867 on, was the existence of military government. That, with the irresponsible people who came to official power, was profoundly disturbing to Lamar, a man deeply committed to integrity in public office and to orderly government, to the forms and procedures of the Constitution. Indeed the whole southern effort had been to preserve the Constitution as it existed prior to 1860. Lamar had spoken many times before the war on adherence to

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[154]GARNER, RECONSTRUCTION IN MISSISSIPPI 75 et seq. (1901); BURGESS, RECONSTRUCTION AND THE CONSTITUTION 37-41 (1902).

[155]6 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 310, 311 (1897); GARNER *id.* at 76.

[156]Letter to Burton Harrison, Aug. 13, 1867, in the B. Harrison Papers (Library of Congress).

[157]Deed from L. Q. C. Lamar to A. B. Longstreet, Jan. 19, 1866, found in Deed Book K, p. 367, Lafayette County, Miss.; Letter From Lamar to "Jimmy," Aug. 11, 1868, in the Lamar Papers (So. Hist. Collection, Univ. of N. C. Library).

[158]Letters From Lamar to "Jimmy," Aug. 11, 1868, in the Lamar Papers (So. Hist. Collection, Univ. of N. C. Library).

[159]*Ibid.*

constitutional processes. He was no revolutionary; the revolution, the overthrow of the status quo, had come from the North, though perhaps as part of the inescapable tides of change. Lamar could accept the results of the war as an accomplished fact. But now with the war over the presence of military authorities supreme over the civil government, undercut his most fundamental ideas. To him this was utterly incompatible with constitutional government. One who saw Lamar in town at a time when federal troops were stationed there reported that "his whole demeanor was distinguished by utter dejection and inconsolable gloom."[160]

A perceptive comment on government under law, with which Lamar surely must have agreed, appeared in the *Falcon* in October 1867, in the form of a letter of resignation submitted to the governor by Judge A. H. Handy, a member of the state's highest court. He felt it proper to set forth publicly his reasons for resigning:

> It is well understood that the United States military commander in this state claims the right, and has the physical power, at discretion, to eject from office any or all of the judges of the state, to appoint others in their places, to set aside and annul the judgments of the courts, and in short to set at naught the Constitution and the laws of the state, from and under which alone I hold office. These pretentions are, in my judgment, incompatible with the supremacy of the civil law, the dearest rights of a free people; and if acquiesced in, must lead to the subserviency in the judges, destructive of their purity; or subject them to the imputation of it; degrading to the dignity of a tribunal which should stand above all suspicion.
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> I have been educated to believe a free and untrammeled judiciary to be the great bulwark of civil liberty in free governments—its protection alike against popular excitement, and the usurpation of those in political power. . . .[161]

Lamar and nearly all prewar leaders in the South were forbidden to "hold any office, civil or military, under the United States, or under any State" by section three of the fourteenth amendment, which was declared adopted in 1868. Only a two-thirds vote of each house of Congress could remove the disability. The consequences of this were brought home to the people in Oxford when Judge Alexander M. Clayton, one of Lamar's close friends, was ousted from the circuit court by the military in the following winter.[162] Freedmen's Bureau agents and federal soldiers were also signs of the new order. There were occasional incidents between the University students and the troops.[163]

This was the condition of things during the years that Lamar was

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[160]Note 89 *supra.*

[161]The Oxford Falcon, Oct. 19, 1867.

[162]The Oxford Falcon, Feb. 20, March 20, 1869.

[163]WADDEL 457.

law professor. The "conquered province" theory had been fully adopted. Lamar and his generation stand apart as the only Americans to experience defeat in war and occupation of their home ground by armed force. The great problem he was wrestling with more and more was how to get the South out of its plight, how to restore the southern states to their normal place in the Union, how to re-instate constitutional government. Gen. James Longstreet, his wife's cousin, with whom Lamar had been in the last hours at Appomattox, had visited with Lamar and Judge Longstreet in Oxford about the time Lamar moved back to begin teaching.[164] The General had already begun to look ahead, and he voiced conciliatory ideas on reunion which were quite impalatable to the unreconstructable.[165] That was probably one of the earliest serious discussions Lamar had on the subject which ultimately brought him to national attention. In any event, he brooded on the matter much in his years of teaching.

Perhaps the chief significance of Lamar's law professorship is that it came at this period. It afforded him a relative withdrawal from public life and provided him with time to read and think about fundamentals. He needed time to get his bearings again after the disintegration of the society he had known since birth. As a law teacher he was forced to simplify and explain basic legal principles. Such life and work was conducive to the kind of thought needed in groping for an adjustment within the constitutional framework. This was a gestation period for Lamar's ideas which later came to fruition in Congress, first and most dramatically in the eulogy on Charles Sumner, then in many other ways during the last two decades of his life.

IX. Farewell to the University

The year 1869 brought the election which ultimately ended the military regime and reinstated civil government in Mississippi. But it was a government chosen by a radically different electorate from that of old. Since passage of the Reconstruction Acts fresh registration had been carried out state-wide under military supervision. For the November 1869 election the registration in Lafayette County was 1,964 white and 1,445 colored.[166] Twenty-eight of the sixty counties had registered colored majorities, and Alcorn, the successful gubernatorial candidate, carried all of them.[167] For registration, an oath was required which in

[164]The Oxford Falcon, Aug. 30, 1866.

[165]Wade, Augustus Baldwin Longstreet 355 (1924).

[166]The Oxford Falcon, Nov. 1869. Although Pres. Johnson had issued a general amnesty proclamation on Christmas Day, 1868, unconditionally pardoning all who had participated in the Confederacy, this did not allow Lamar and other Southern leaders to vote because Congress had barred them by statute. See Burgess, note 154 *supra*, at 215-16, 227-30.

[167]Garner, note 154 *supra*, at 246.

substance disqualified all those who were prohibited from holding office by the fourteenth amendment.[168] Thus Lamar and most southern leaders were disfranchised.

In the first months of 1870, in Lamar's fourth year of law teaching, the "reconstructed" state government took over. Alcorn was inaugurated governor, and the legislature curiously elected three United States Senators. For a full term beginning in 1871 Alcorn was chosen. To the seat formerly held by Jefferson Davis the negro Hiram Revels was elected. Adelbert Ames, the recent military governor from Maine, was named for the other unexpired term.[169] A few "radicals" were also added to the University Board of Trustees. These events caused fear among many that the University was going to be drastically "radicalized" and that negroes would be admitted. Actually this did not happen, and there was little change in the institution.[170] The whole thing was unsettling, however, and the Board did not even meet at commencement that year. Degrees were conferred by the faculty, something that had never been done before.[171]

Lamar shared these apprehensions in the spring of 1870, and was of course completely out of sympathy with the group that had assumed political power. He seems to have felt that his usefulness on the faculty had ended. In any event, he tendered his resignation at the end of the session.[172] His action may have been motivated in part by a desire to give more time to his growing law practice, and perhaps, though he disavowed it, the old political urge was beginning to take hold again.

Toward the end of the session, after the resignation was announced, the law students presented the departing professor with "a fine divan."[173] One of his senior students, Benjamin I. Hicks, who had been a captain in the Confederate Army, made what the local paper described as "a feeling and eloquent address," to which Lamar responded in his unique style.[174] And when commencement came in June Lamar made a farewell speech as a member of the faculty. He spoke for an hour, and when he finished, the honor man in the graduating law class, Joseph A. Brown, paid tribute to him on behalf of the students. Lamar then once more rose and wished them happiness and prosperity through life, adding in his typically haunting language, "with just enough of sorrow to remind you that this earth is not your home."[175]

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[168] *Id.* at 174.

[169] *Id.* at 271; The Oxford Falcon, Jan. 29, 1870.

[170] CABANISS, A HISTORY OF THE UNIVERSITY OF MISSISSIPPI 80 et seq. (1949); MAYES 126-27.

[171] MAYES, HISTORY 164.

[172] MAYES 127.

[173] The Oxford Falcon, May 21, 1870.

[174] *Ibid.*

[175] MAYES 127.

Thus L. Q. C. Lamar finally severed his connection with the University of Mississippi exactly twenty years after he first came on the faculty. Much of his life had centered on the wooded circle and the Lyceum, but this was at an end. He was turning his attention to the law office on the square where a new courthouse was rising in the center of the little town of Oxford. Soon he would be concerned with much larger matters. In summing up, with some immodesty, he wrote a friend, "I have been very successful as a law teacher."[176] And he probably was. Chancellor Waddel said that in teaching law Lamar "found himself breathing an atmosphere most congenial to his taste and his great abilities."[177] He made no written contribution to legal scholarship, but perhaps his tenure was too short, the times too out of joint for such. Moreover, Lamar, though able and thoughtful, was not the kind of legal scholar apt to produce a treatise. He was not of the same mold as, for example, John B. Minor or Emory Washburn, his contemporaries in law teaching who authored some of the well-known texts. Lamar was more interested in the great public issues. The spoken word was his most effective medium. His academic distinctions, apart from whatever excellence there was in his teaching, came in the form of honorary degrees—the LL.D. from Davidson and the University of Georgia, as well as from his own institution.[178] In time, Harvard would add its honorary doctorate to these.[179]

In retrospect, the four years of Lamar's law professorship appear as an interlude in his life. Given a slightly different bent of mind he might have pursued an academic career. He obviously had an interest in that direction, as he had gone into teaching on three different occasions. But the pull of the active political arena always seemed to reclaim him. It is understandable that when he was nominated for the Supreme Court the tumultuous events in which he had participated through nearly four decades would obscure the relatively brief period of withdrawal in which he taught law to a few dozen young men. Even if one had been in Oxford in that summer of 1870 he would have noted only that Col. Lamar—after the war he was always addressed this way, not as "Professor"—was resigning his place at the University and would continue the practice of law. The most vivid imagination would hardly have predicted that this forty-five year old former secessionist, now barred from public office by the Constitution, would be in Washington in little more than two years again taking a seat in the House of Representatives and that he would serve at the highest level in all branches of the federal government before his death twenty-three years later.

176MAYES 128.

177WADDEL 459.

178The Oxford Falcon, Aug. 3, 10, 1867; WADDEL 487; HISTORICAL CATALOGUE 98.

179MAYES 507.

AUTOMOBILES AND ALCOHOL TAX VIOLATIONS IN THE FIFTH CIRCUIT

*Alfred E. Moreton, III**

I. Introduction

Last year alone, 2,621 vehicles were seized by the Alcohol and Tobacco Tax Division of the Internal Revenue Service.[1] The source of difficulty for most of these vehicles was the illegal liquor still. The six states comprising the Fifth Circuit were among the fourteen which accounted for 93.4 per cent of the illicit stills seized during the same period.[2] It is not unlikely, therefore, that a practitioner in the Fifth Circuit will be confronted eventually or occasionally with the problem of representing an automobile accused of violating the alcohol tax laws.

One undertaking the task for the first time is apt to be dismayed by what he encounters. The procedure is partly administrative and partly judicial. The proceeding has a criminal appearance, is related to admiralty, but is really civil in nature. The simplest substantive or procedural problem may require an immense amount of research and an extensive federal library—from the Code of Federal Regulations to the Supreme Court Reports—for solution. These considerations explain the purpose of this article.

This article does not essay a critical analysis of the law of forfeitures under the internal revenue laws. It is intended rather as a practical aid in the initial evaluation of a forfeiture case and as a simple procedural guide. In regard to the latter it should be noted that procedure may vary, and does appear to vary frequently, in the several district courts. What is presented here is a composite pieced together from the limited material available on the subject.

II. Seizure

Any conveyance which is used to transport, deposit, or conceal (1) any liquor possessed for the purpose of sale or removal, or which is removed, deposited, or concealed, with intent to defraud the United States of the tax due thereon, (2) any raw materials intended for manufacture into liquor to be sold in fraud of the revenue laws, or

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[1]Comm'r Int. Rev. Ann. Rep. 57 (1962).

[2]*Ibid.*

(3) any property intended to be used in making or packaging such liquor is subject to seizure as forfeited to the United States.[3] Likewise, any vehicle used or intended for use in violating any other provision of the internal revenue laws may be seized and condemned as forfeited.[4]

A search warrant may issue for the seizure of the vehicle,[5] or the search and seizure may be made without a warrant on probable cause.[6] Factors which may establish probable cause include (1) the reputation of, or informant's reports concerning, the occupants, (2) the reputation of the vehicle or its owners, (3) the condition of the vehicle, *e.g.*, heavily loaded, (4) information from reputable informers as to the existence and illegal purpose of the trip, and (5) the reputation of the location.[7] Thus, there is probable cause for a search where officers, having information that a particularly described vehicle is transporting tax-unpaid liquor, locate the vehicle at a place having a reputation for "moonshine activities" and recognize the driver as a person with a reputation for being in the moonshine business.[8] However, the mere fact that a car is parked in the neighborhood of a moonshiner's still does not constitute probable cause to search the vehicle.[9] Knowledge of the driver's prior illegal whiskey activities, information that he has been purchasing raw materials and hauling them in the particular vehicle, and his attempt to conceal his identity as he drove by the officers are sufficient to give the officers probable cause to search the vehicle.[10] The search of an automobile sagging in the rear by officers who had been alerted by an informant and who recognized the only passenger as a bootlegger is reasonable.[11] Furthermore, the rule of the *Roviaro* case,[12] requiring the Government to reveal the identity of its informant when

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[3]See INT. REV. CODE OF 1954, § 7301; *e.g.*, Oliver v. United States, 170 F.2d 142 (5th Cir. 1948) (jugs); United States v. One Chevrolet Truck, 1934 Model, 79 F.2d 651 (5th Cir. 1935) (distilled spirits); Edenfield v. United States, 79 F.2d 515 (5th Cir. 1935) (raw materials); United States v. One Bay Horse, 270 Fed. 590 (N.D. Ga. 1921) (still).

[4]See INT. REV. CODE OF 1954, § 7302; *e.g.*, Utley Wholesale Co. v. United States, 308 F.2d 157 (5th Cir. 1962) (used); Kent v. United States, 157 F.2d 1 (5th Cir.), *cert. denied*, 329 U.S. 785 (1946) (intended for use).

[5]INT. REV. CODE OF 1954, § 7302.

[6]*E.g.*, Grogan v. United States, 261 F.2d 86, 87 (5th Cir. 1958), *cert. denied*, 359 U.S. 944 (1959).

[7]Patenotte v. United States, 266 F.2d 647, 650 (5th Cir. 1959).

[8]See United States v. Holland, 242 F.2d 248 (5th Cir. 1957). Compare Turner v. Camp, 123 F.2d 840 (5th Cir. 1941).

[9]Robinson v. United States, 164 F.2d 271, 273 (5th Cir. 1947).

[10]Grogan v. United States, 261 F.2d 86, 87 (5th Cir. 1958), *cert. denied*, 359 U.S. 944 (1959).

[11]United States v. Carey, 272 F.2d 492, 494 (5th Cir. 1959).

[12]Roviaro v. United States, 353 U.S. 53 (1957).

the reasonableness of a search depends on his reliability, does not apply to a seizure of property under the internal revenue laws.[13]

The seizure may be made by any duly authorized officer of the Internal Revenue Service,[14] but if the seizure is made by one having no authority to make it, the United States may nevertheless adopt the seizure with the same effect as if it had been made originally by one duly authorized.[15] It is not necessary that the seizure be contemporaneous with the offense, and an officer of the United States, having seen the vehicle used in violation of the internal revenue laws, may return to the premises on a later date and, without a writ or warrant, seize the vehicle for the previous violation.[16] After the vehicle is seized, it may, at the option of the Treasury Department, be retained in the custody of the seizing agency or delivered to the United States Marshal of the judicial district wherein the seizure was made, pending disposition of the property as provided by law.[17]

III. Forfeiture

The liability of a seized vehicle may be compromised by the Secretary of the Treasury before the case is referred to the United States Attorney for prosecution.[18] Thereafter, liability may be compromised by the Attorney General,[19] or the vehicle may be forfeited either administratively[20] or judicially.[21]

If the appraised value of the vehicle is $2,500 or less, it may be forfeited administratively.[22] If the officer who seized the vehicle is of the opinion that its value is $2,500 or less, he has it appraised by three sworn appraisers.[23] If the appraised value is $2,500 or less, the Supervisor in Charge, Alcohol and Tobacco Tax, Internal Revenue Service,[24]

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[13]See United States v. Carey, 272 F.2d 492, 493 (5th Cir. 1959); United States v. One 1960 Ford Convertible, 209 F. Supp. 247, 248 (S.D. Miss. 1962).

[14]Int. Rev. Code of 1954, §§ 7321, 7608; 26 C.F.R. § 172.25 (1961).

[15]United States v. One Ford Coupe, 272 U.S. 321 (1926); Two Certain Ford Coupe Automobiles v. United States, 53 F.2d 187, 188 (5th Cir. 1931); United States v. Story, 294 Fed. 517, 519 (5th Cir. 1923).

[16]Sanders v. United States, 201 F.2d 158, 159 (5th Cir. 1953); see Two Certain Ford Coupe Automobiles v. United States, 53 F.2d 187 (5th Cir. 1931); United States v. One 1947 Ford Club Coupe, 108 F. Supp. 262, 263 (S.D. Miss. 1952) (federal seizure based on prior observations of state officers); *cf.* The Sterling, 65 F.2d 439 (5th Cir. 1933).

[17]See Int. Rev. Code of 1954, § 7322; 26 C.F.R. § 301.7322-1 (1961).

[18]Int. Rev. Code of 1954, § 7122; 26 C.F.R. § 172.43(b) (1961).

[19]Int. Rev. Code of 1954, § 7122.

[20]See Int. Rev. Code of 1954, §§ 7325(2), (4).

[21]See Int. Rev. Code of 1954, § 7325(3).

[22]See Int. Rev. Code of 1954, § 7325(2).

[23]26 C.F.R. § 172.26(a)(2) (1961); see Int. Rev. Code of 1954, §§ 7325(1)-(2).

[24]26 C.F.R. § 172.19 (1961).

publishes a notice, once a week for three consecutive weeks in some newspaper of the judicial district where the seizure occurred, describing the vehicle, stating the time, place, and cause of its seizure, and requiring any interested person to appear and interpose his claim within thirty days from the date of the first publication of notice.[25]

Within thirty days from the date of the first publication, any person claiming the vehicle must file with the supervisor in charge a claim stating his interest in the property and must execute a bond to the United States in the penal sum of $250, conditioned that, in case of condemnation of the vehicle, the obligors shall pay all the costs and expenses of the proceeding.[26] Both the claim and the bond must be executed in quadruplicate.[27] The bond must be a corporate surety bond[28] given by a company certified by the Secretary of the Treasury as acceptable sureties on federal bonds,[29] unless the Supervisor in Charge is satisfied that the claimant is unable to furnish a corporate surety bond, in which case he may allow the claimant to post a cost bond with individual sureties acceptable to the Supervisor in Charge.[30] Bonds or notes of the United States, cash, postal money orders, and certified checks may be deposited as collateral security in lieu of corporate sureties, however.[31] In most instances, appropriate forms together with instructions for their preparation, are provided by the Alcohol and Tobacco Tax Division.[32]

If no claim is interposed and no bond is given within the time specified,[33] the vehicle is sold at public auction after ten days' notice by publication.[34] If a claim and bond are filed, however, or if the appraised value of the vehicle exceeds $2,500, the administrative proceeding is terminated and the United States Attorney institutes a judicial libel proceeding.[35]

The proceeding to enforce the forfeiture in such cases is in the nature of a proceeding in rem in the United States District Court for the district where the seizure was made.[36] The initial proceedings are conducted in accordance with admiralty practice,[37] and are commenced

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[25] 26 C.F.R. § 172.26 (a) (3) (1961); see INT. REV. CODE OF 1954, § 7325 (2).

[26] 26 C.F.R. § 172.26 (a) (5) (1961); see INT. REV. CODE OF 1954, §§ 7325 (2) - (3).

[27] 26 C.F.R. § 172.26 (a) (5) (1961).

[28] 26 C.F.R. § 172.27 (1961).

[29] 26 C.F.R. § 172.28 (1961).

[30] 26 C.F.R. § 172.27 (1961).

[31] 26 C.F.R. § 172.29 (1961).

[32] See 26 C.F.R. § 172.2 (1961).

[33] INT. REV. CODE OF 1954, § 7325 (4).

[34] 26 C.F.R. § 172.55 (1961).

[35] 26 C.F.R. § 172.26 (b) (1961); see United States v. One Ford Coach, 307 U.S. 219, 228 (1939).

[36] INT. REV. CODE OF 1954, § 7323 (a).

[37] 7 MOORE, FEDERAL PRACTICE ¶ 81.05[6], at 4439 (2d. ed. 1955).

by the filing of a libel of information which corresponds to the complaint in civil cases.[38] The party complaining is called the libelant, the party resisting is called generically the respondent or defendant, which terms may be used of either a person or a thing defending, and the personal defendant is called the claimant, since his right to appear or intervene in the in rem suit depends on his claiming an interest in the property.[39]

The libel of information[40] should state the place of seizure, whether it be on land or water, the district into which the property was brought, where it then is, the matters relied on as grounds of forfeiture, and that the same are contrary to the statutes of the United States.[41] It should conclude with a prayer of due process to enforce the forfeiture and to give notice to all persons concerned to appear and show cause at the return day of the process why the forfeiture should not be decreed.[42] It is not necessary that the libel of information be verified,[43] unless required by local rule.[44]

The process issued is a warrant to attach the property and usually contains a monition to "all parties interested" to appear and show cause why the property should not be condemned.[45] The monition or process[46] is issued by the clerk of the district court[47] to the United States Marshal of that district.[48] It is thereupon the duty of the marshal to attach the vehicle and safely keep it subject to the order and decree of the court.[49] He cannot, on arrest of the vehicle, take any bail for it, but must retain the property specifically.[50] If the property is already in his custody, the marshal merely holds it and makes his return.[51] The marshal files his return[52] with the clerk of the court[53] and gives notice by publication of the arrest of the vehicle and the return date of the

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[38] 2 BENEDICT, ADMIRALTY § 239 (6th ed. 1940).

[39] *Id.* § 230.

[40] *E.g.*, 4 WEST, FEDERAL FORMS § 5923A (Darnieder ed., Supp. 1962).

[41] FED. R. ADM. P. 21.

[42] *Ibid.*

[43] 2 BENEDICT, *op. cit. supra* note 38, § 240. *Compare* FED. R. ADM. P. 21, *with* FED. R. ADM. P. 22.

[44] See, *e.g.*, S.D. ALA. ADM. R. 2.

[45] 2 BENEDICT, *op. cit. supra* note 38, § 295; see FED. R. ADM. P. 10.

[46] *E.g.*, 5 BARRON, HOLTZOFF, DARNIEDER & KEOGH, FEDERAL PRACTICE AND PROCEDURE § 4452 (1951); 4 WEST, FEDERAL FORMS § 5924 (Darnieder ed. 1952).

[47] 5 BARRON, *op. cit. supra* note 46, at 586.

[48] 5 BARRON, *op. cit. supra* note 46, at 594; see FED. R. ADM. P. 1.

[49] 2 BENEDICT, *op. cit. supra* note 38, § 295; see FED. R. ADM. P. 10; 5 BARRON, *op. cit. supra* note 46, at 594.

[50] 2 BENEDICT, *op. cit. supra* note 38, § 295.

[51] Miller v. United States, 78 U.S. (11 Wall.) 268, 294 (1870).

[52] *E.g.*, 5 BARRON, *op. cit. supra* note 46, § 4452; 4 WEST, *op. cit. supra* note 46, § 5924.

[53] 5 BARRON, *op. cit. supra* note 46, at 594.

process.[54] The return date for process is fixed by the rules of the district courts.[55] In both the Northern[56] and the Southern[57] Districts of Mississippi, notice must be published for one issue in some newspaper published and circulated within the district and the return day of the warrant of seizure and monition must be not less than ten days after the date of publication.

The claimant must file a claim[58] and a stipulation for costs[59] on or before the return day of the process,[60] unless a claim and a cost bond were previously filed with the Supervisor in Charge for transmission to the United States Attorney to effect the transfer of the forfeiture proceeding into court.[61] The security for costs is usually given by stipulation, which is the proper name for an undertaking of security in admiralty and not by bond, although there is no legal objection to its having the form of a bond.[62] The district courts are authorized by the Admiralty Rules to fix the amount of the stipulation for costs.[63] In in rem suits the amount is usually $250,[64] which is the same as the amount of the bond which must be filed with the Supervisor in Charge to transfer the forfeiture proceeding to the district court.[65] No set form of words is necessary to the claim,[66] but it must be verified.[67] The stipulation must accompany the claim,[68] and without them the claimant is not entitled to be heard.[69]

If no claimant appears on the return of process, the defaults of all persons are entered by the clerk,[70] in accordance with rule 55 of the

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[54]FED. R. ADM. P. 10; 2 BENEDICT, *op. cit. supra* note 38, § 295.

[55]2 BENEDICT, *op. cit. supra* note 38, § 310, n.1; see FED. R. ADM. P. 10; Criscuolo v. Atlas Imperial Diesel Engine Co., 84 F.2d 273, 278 (9th Cir. 1936).

[56]N.D. MISS. ORDER, Civ. Order Bk. No. 3 (Mar. 2, 1955).

[57]S.D. MISS. ORDER (Sept. 17, 1956).

[58]*E.g.*, 5 BARRON, *op. cit. supra* note 46, § 4455; 4 WEST, *op. cit. supra* note 46, § 5927.

[59]*E.g.*, 5 BARRON, *op. cit. supra* note 46, § 4458; 4 WEST, *op. cit. supra* note 46, § 5930.

[60]2 BENEDICT, *op. cit. supra* note 38, § 312.

[61]See INT. REV. CODE OF 1954, § 7325 (3); United States v. One 1960 Model Ford Truck, 189 F. Supp. 913, 914 (N.D. Ala. 1960); United States v. One 1936 Model V-8 Ford Coach, 53 F. Supp. 805 (S.D. Ga. 1945).

[62]2 BENEDICT, *op. cit. supra* note 38, § 277.

[63]*Ibid.*; see FED. R. ADM. P. 24.

[64]2 BENEDICT, *op. cit. supra* note 38, § 277 at 314-15; see, *e.g.*, N.D. MISS. ORDER, Civ. Order Bk. No. 3 (Mar. 2, 1955).

[65]See INT. REV. CODE OF 1954, § 7325 (3). See also note 26 *supra* and accompanying text.

[66]2 BENEDICT, *op. cit. supra* note 38, § 324, at 437-38.

[67]FED. R. ADM. P. 25.

[68]*Ibid.*; see 2 BENEDICT, *op. cit. supra* note 38, § 312.

[69]See 2 BENEDICT, *op. cit. supra* note 38, § 327; *cf.* Colonial Press, Inc. v. The Allen's Cay, 277 F.2d 540, 541 (5th Cir. 1960).

[70]See 2 BENEDICT, *op. cit. supra* note 38, § 315.

Federal Rules of Civil Procedure[71] and the court enters a decree of condemnation[72] ordering a forfeiture pursuant to the allegations and prayer of the libel of information.[73]

The mere putting in of a claim is not a defense to the libelant's demand, however.[74] An answer[75] must also be filed.[76] Answer should be made to each separate article and allegation in the libel in the same order as numbered in the libel,[77] and special defenses should be separately pleaded and numbered.[78] The answer must be verified[79] and must be made on the return day of process or other day assigned by the court.[80] In the Northern and Southern Districts of Mississippi, a day twenty days after the return date of the warrant of seizure and monition is customarily assigned.

Any claimant who shall establish his right to immediate possession of the vehicle may petition[81] the court for an order[82] for the release of the vehicle on bond.[83] The bond[84] or stipulation for value[85] should be in an amount equal to the appraised value of the vehicle and must be conditioned to return the vehicle at the time of trial and to pay the difference between the appraised value at the time of release and the time of trial.[86] It must be conditioned further that, if the vehicle be not returned, the bond shall be forfeited.[87] Release is discretionary, however, and for good cause shown by the United States the court may refuse to order delivery.[88]

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[71]See Reynal v. United States, 153 F.2d 929, 931 (5th Cir. 1945). See generally, 5 MOORE, FEDERAL PRACTICE ¶ 38.12[7] (2d ed. 1951).

[72]*E.g.*, 5 BARRON, *op. cit. supra* note 46, §§ 4465, 4467; 4 WEST, *op. cit. supra* note 46 §§ 5937, 5939.

[73]See 2 BENEDICT, *op. cit. supra* note 38, § 318; *cf.* Miller v. United States, 78 U.S. (11 Wall.) 268, 299 (1870).

[74]2 BENEDICT, *op. cit. supra* note 38, § 327, at 449.

[75]*E.g.*, 5 BARRON, *op. cit. supra* note 46, § 4459; 4 WEST, *op. cit. supra* note 46, § 5931.

[76]2 BENEDICT, *op. cit. supra* note 38, § 327.

[77]FED. R. ADM. P. 26.

[78]2 BENEDICT, *op. cit. supra* note 38, § 338.

[79]FED. R. ADM. P. 26; *e.g.*, 5 BARRON, *op. cit. supra* note 46, § 4459; 4 WEST, *op. cit. supra* note 46, § 5931.

[80]FED. R. ADM. P. 28.

[81]*E.g.*, 5 BARRON, *op. cit. supra* note 46, § 4453; 4 WEST, *op. cit. supra* note 46, §§ 5925, 5926A (Supp. 1962).

[82]*E.g.*, 4 WEST, *op. cit. supra* note 46, § 5932A (Supp. 1962).

[83]18 U.S.C. § 3617(d) (1958).

[84]See, *e.g.*, 5 BARRON, *op. cit. supra* note 46, § 4457; 4 WEST, *op. cit. supra* note 46, § 5929.

[85]See, *e.g.*, 5 BARRON, *op. cit. supra* note 46, § 4456; 4 WEST, *op. cit. supra* note 46, § 4928.

[86]18 U.S.C. § 3617(d) (1958).

[87]*Ibid.*

[88]18 U.S.C. § 3617(d) (1958).

After the libel is filed and jurisdiction is obtained, the forfeiture proceeding takes the character of an action at law and is governed by the Federal Rules of Civil Procedure.[89] The trial is conducted in the same way as a civil trial, and the same rules of evidence apply.[90] It is a common law case in which a jury trial is a constitutional right.[91] Therefore, any party may demand a trial by jury,[92] although they are very rare,[93] but his failure to do so as required by the Rules of Civil Procedure constitutes a waiver of the right,[94] and the granting of a jury trial is thereafter committed to the discretion of the court.[95] Where there is no genuine issue of material fact, the action may be disposed of under the summary judgment procedure of rule 56 of the Federal Rules of Civil Procedure.[96]

The weight of authority seems to support the proposition that forfeiture actions in rem are essentially civil in nature and should not be burdened with the attributes of a criminal prosecution.[97] Consequently, while the United States is required to prove every essential allegation of the libel,[98] a lengthy line of cases[99] has held the burden of proof to be the lesser civil one of "preponderance of the evidence" in contrast to the criminal standard of "beyond a reasonable doubt." For the same reason, the question of the legality of the search and seizure

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[89]See United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 642 (5th Cir. 1952); Reynal v. United States, 153 F.2d 929, 931 (5th Cir. 1945). See generally 7 MOORE, FEDERAL PRACTICE ¶ 81.05[6] (2d ed. 1955).

[90]5 BARRON, *op. cit. supra* note 46, at 586.

[91]Vandevander v. United States, 172 F.2d 100, 101 (5th Cir. 1949); see United States v. One Ford Sedan, 297 Fed. 830, 831 (5th Cir. 1924); *cf.* One Plymouth Automobile v. United States, 165 F.2d 186, 187 (5th Cir. 1948). See generally 5 MOORE, FEDERAL PRACTICE ¶ 38.31[1] (2d ed. 1951).

[92]FED. R. CIV. P. 38(b); see 5 MOORE, *op. cit. supra* note 91, ¶ 38.12[7].

[93]5 BARRON, *op. cit. supra* note 46, at 586.

[94]FED. R. CIV. P. 38(d); see 5 MOORE, *op. cit. supra* note 91, ¶ 38.12[7].

[95]FED. R. CIV. P. 39(b); see 5 MOORE, *op. cit. supra* note 91, ¶ 38.12[7].

[96]6 MOORE, FEDERAL PRACTICE ¶ 56.17[26] (2d ed. 1953). See *e.g.*, United States v. Burch, 294 F.2d 1 (5th Cir. 1961); United States v. One 1960 Model Ford Truck, 189 F. Supp. 913 (N.D. Ala. 1960). Compare Florida Dealers & Growers Bank v. United States, 279 F.2d 673 (5th Cir. 1960).

[97]United States v. Burch, 294 F.2d 1, 3 (5th Cir. 1961). Compare Kent v. United States, 157 F.2d 1, 2 (5th Cir.), *cert denied*, 329 U.S. 785 (1946), which distinguishes Boyd v. United States, 116 U.S. 616 (1886).

[98]*E.g.*, United States v. Bryan, 265 F.2d 698, 701 (5th Cir. 1959).

[99]Utley Wholesale Co. v. United States, 308 F.2d 157, 159 (5th Cir. 1962); Burt v. United States, 283 F.2d 473, 474 (5th Cir. 1960); Martin v. United States, 277 F.2d 785, 786 (5th Cir. 1960); Paternotte v. United States, 266 F.2d 647, 651 (5th Cir. 1959); United States v. Bryan, 265 F.2d 698, 701 (5th Cir. 1959); Stagner v. United States, 197 F.2d 992, 994 (5th Cir. 1952); Anderson v. United States, 185 F.2d 343, 345 (5th Cir. 1950); Two Certain Ford Coupe Automobiles v. United States, 53 F.2d 187, 189 (5th Cir. 1931).

cannot be raised,[100] and even if it were assumed that the search and seizure were illegal, the Government's action for a forfeiture would not be defeated.[101]

If the libel alleges that the vehicle was used in the transportation or concealment of tax-unpaid liquor, the United States has the burden of showing that the liquor has not paid its tax.[102] This fact may be established by proof of the absence of stamps.[103] An intent to defraud on the part of the one who used the vehicle must also be established.[104] The intent necessary, however, may be inferred from the facts as a matter of circumstantial evidence.[105] Although the claimant cannot be compelled to testify,[106] if he declines to explain the circumstances, where he has it in his power to do so, his silence may count against him as against any other civil litigant.[107] The quantity of liquor involved is immaterial, and as little as one quart of tax-unpaid whiskey is suffi-

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[100]Martin v. United States, 277 F.2d 785, 786 (5th Cir. 1960).

[101]United States v. Carey, 272 F.2d 492, 494 (5th Cir. 1959); see Grogan v. United States, 261 F.2d 86, 87-88 (5th Cir. 1958), *cert. denied*, 359 U.S. 944 (1959); United States v. One 1953 Model Mercury Sedan Automobile, 149 F. Supp. 657, 658 (S.D. Ala. 1957); United States v. One 1947 Ford Club Coupe, 109 F. Supp. 262, 263 (S.D. Miss. 1952). But see Walker v. United States, 125 F.2d 392 (5th Cir. 1942); *cf.* United States v. A Certain Distillery, 24 F.2d 557 (E.D. La. 1928). Compare Turner v. Camp, 123 F.2d 840, 842 (5th Cir. 1941).

[102]Vandevander v. United States, 172 F.2d 100, 102 (5th Cir. 1949); The Czecho-Slovakia, 58 F.2d 746, 747 (5th Cir. 1932).

[103]Cases cited note 102 *supra; accord*, Johnson v. United States, 276 F.2d 84, 86 (4th Cir. 1960).

[104]Anderson v. United States, 185 F.2d 343, 346 (5th Cir. 1950); see Vandevander v. United States, 172 F.2d 100, 102 (5th Cir. 1949); United States v. One 1952 Chevrolet Pickup Truck, 111 F. Supp. 231, 232 (S.D. Miss. 1953), *rev'd on other grounds*, 213 F.2d 797 (5th Cir. 1954); United States v. One Marmon Automobile, 5 F.2d 113, 115 (N.D. Ga.), *rev'd on other grounds sub nom.* Marmon Atlanta Co. v. United States, 8 F.2d 267 (5th Cir. 1925). *But see* United States v. One 1952 Lincoln Sedan, 213 F.2d 786, 790 (5th Cir. 1954) (dissenting opinion).

[105]Anderson v. United States, 185 F.2d 343, 346 (5th Cir. 1950); The Czecho-Slovakia, 58 F.2d 745, 747 (5th Cir. 1932); United States v. One Marmon Automobile, 5 F.2d 113, 115 (N.D. Ga.), *rev'd on other grounds sub nom.* Marmon Atlanta Co. v. United States, 8 F.2d 267 (5th Cir. 1925); see United States v. Bryan, 265 F.2d 698, 701 (5th Cir. 1959); Two Certain Ford Coupe Automobiles v. United States, 53 F.2d 187, 189 (5th Cir. 1931); United States v. One 1952 Chevrolet Pickup Truck, 111 F. Supp. 231, 232 (S.D. Miss. 1953), *rev'd on other grounds*, 213 F.2d 797 (5th Cir. 1954). Compare United States v. One 1939 Chevrolet Sedan, 35 F. Supp. 142, 143 (S.D. Fla. 1940) (intent not inferable from inconsequential amount of whiskey).

[106]Hudson v. United States, 197 F.2d 845, 846 (5th Cir. 1952). *But cf.* Kent v. United States, 157 F.2d 1, 2 (5th Cir.), *cert. denied*, 329 U.S. 785 (1946).

[107]Anderson v. United States, 185 F.2d 343, 346 (5th Cir. 1950); see Stagner v. United States, 197 F.2d 992, 994 (5th Cir. 1952).

cient to effect a forfeiture of the vehicle.[108] Evidence, however, which shows only that an occupant of a parked car had a quantity of tax-unpaid whiskey on his person, fails to implicate the vehicle in the transportation or concealment of the liquor.[109]

Even though the whiskey is tax-paid, a vehicle used to carry on the business of a retail liquor dealer where no federal retail liquor dealer's license has been obtained is forfeitable.[110] Likewise, the use of an automobile in carrying on the business of a wholesale dealer in tax-paid liquor will subject the vehicle to forfeiture if the dealer fails to register, pay the wholesale tax, and keep the required records.[111]

It is not necessary that liquor be transported in the vehicle, however.[112] The vehicle may be forfeited if it is used to transport or conceal raw materials intended for manufacture into liquor,[113] or containers intended for the packaging of the finished product.[114] Moreover, a vehicle which is used to transport materials intended for use in violating the internal revenue laws is itself property used or intended for use in violating such laws.[115] Evidence which shows no more than that an automobile made several trips to a distillery site where raw materials were found will not, however, support an inference that the

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[108]See Anderson v. United States, 185 F.2d 343, 346 (5th Cir. 1950). *But cf.* United States v. One 1939 Chevrolet Sedan, 35 F. Supp. 142 (S.D. Fla. 1940) (two jugs containing half a snort each).

[109]One 1941 Oldsmobile Sedan v. United States, 161 F.2d 348, 353 (5th Cir. 1947); *cf.* United States v. One Ford Coupe Automobile, 26 F. Supp. 867, 869 (W.D. Tex. 1939).

[110]United States v. Ganey, 183 F.2d 273, 274 (5th Cir. 1950); One Ford Tudor Automobile, 1946 Model v. United States, 164 F.2d 1020, 1021 (5th Cir. 1947); see United States v. One 1940 Ford Sedan, 86 F. Supp. 170 (N.D. Fla. 1949) (forfeiture denied on insufficient evidence); United States v. One 1946 Chevrolet Coach, 86 F. Supp. 169 (N.D. Fla. 1949) (forfeiture denied on insufficient evidence); *cf.* United States v. Fifty-Two Cases of Distilled Spirits, 62 F. Supp. 749 (E.D. La. 1945), *aff'd sub nom.* Kent v. United States, 157 F.2d 1 (5th Cir.), *cert. denied*, 329 U.S. 785 (1946).

[111]See Kent v. United States, 157 F.2d 1 (5th Cir.), *cert. denied* 329 U.S. 785 (1946).

[112]United States v. One 1952 Lincoln Sedan, 213 F.2d 786, 790 (5th Cir. 1954).

[113]United States v. One 1960 Ford Pickup Truck, 306 F.2d 106 (5th Cir. 1962) (sugar and yeast); Martin v. United States, 277 F.2d 785 (5th Cir. 1960) (310 sacks of sugar); United States v. Bryan, 265 F.2d 698 (5th Cir. 1959) (10,000 pounds of sugar); Stroud v. United States, 199 F.2d 923 (5th Cir. 1952) (sugar, barley malt, rye meal, yeast); Edenfield v. United States, 79 F.2d 515 (5th Cir. 1935) ("bead oil"); United States v. One 1953 G.M.C. Pickup Truck, 123 F. Supp. 480 (M.D. Ga. 1954) (varying quantities of sugar, malt, yeast); United States v. One Ford Truck, 46 F.2d 176 (S.D. Tex. 1931) (1,600 pounds of sugar).

[114]Oliver v. United States, 170 F.2d 142, 143 (5th Cir. 1948) (23 one-gallon jugs); *accord*, United States v. One 1960 Ford four-door Galaxie Sedan, 202 F. Supp. 841 (E.D. Tenn. 1962) (quantity of paper bags).

[115]United States v. One 1952 Lincoln Sedan, 213 F.2d 786, 789 (5th Cir. 1954).

vehicle transported the supplies where other vehicles were also used in the transportation of such materials.[116]

A vehicle will not be condemned on the mere suspicion that the materials found therein were intended for use in the manufacture of whiskey.[117] Evidence relevant to the issue of intended use of the materials, however, includes the claimant's silence on the matter,[118] giving false information in purchasing the materials,[119] the combinations in which the materials are found,[120] prior convictions for violations of internal revenue laws,[121] prior arrests for similar offenses,[122] and prior similar acts.[123] What reliable informants told officers is inadmissible on the issues of intended purpose of the materials although the reputation of the persons associated with the claimant in the procurement and disposition of the supplies may be admissible.[124]

Although the vehicle has transported neither liquor nor raw materials, it may nevertheless be forfeited if it were otherwise used in violating the internal revenue laws.[125] Consequently a vehicle used in mak-

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[116]Burt v. United States, 283 F.2d 473, 474 (5th Cir. 1960). Compare Robinson v. United States, 164 F.2d 271, 273 (5th Cir. 1947), where, on a libel for the deposit, removal, and concealment of *containers* intended for use in the production of whiskey, it was held that the presence of three empty kegs smelling strongly of whiskey found in a car in the vicinity of a still from which the tracks of the car led, did not establish that the car was used or intended for use in the removal, deposit, and concealment of *whiskey*.

[117]Richardson v. United States, 145 F.2d 764 (5th Cir. 1944); see United States v. One 1939 Plymouth Deluxe Tudor Sedan, 63 F. Supp. 797 (S.D. Fla. 1945).

[118]Williams v. United States, 199 F.2d 921, 923 (5th Cir. 1952); United States v. One 1953 Model G.M.C. Pickup Truck, 123 F. Supp. 480, 483 (M.D. Ga. 1954); see Patenotte v. United States, 266 F.2d 647, 653 (5th Cir. 1959); *cf.* Kent v. United States, 157 F.2d 1, 5 (5th Cir.), *cert. denied*, 329 U.S. 785 (1946).

[119]See Martin v. United States, 277 F.2d 785, 786 (5th Cir. 1960); United States v. One 1953 Model G.M.C. Pickup Truck, 123 F. Supp. 480, 481, 483 (M.D. Ga. 1954).

[120]See Patenotte v. United States, 266 F.2d 647, 651-52 (5th Cir. 1959); Williams v. United States, 199 F.2d 921, 923 (5th Cir. 1952); United States v. One 1953 Model G.M.C. Pickup Truck, 123 F. Supp. 480, 483 (M.D. Ga. 1954).

[121]See Williams v. United States, 199 F.2d 921, 922 (5th Cir. 1952) (conviction 14 years earlier).

[122]Stroud v. United States, 199 F.2d 923, 924, 925 (5th Cir. 1952) (arrested at a distillery 3 years earlier).

[123]Stroud v. United States, 199 F.2d 923, 924, 925 (5th Cir. 1952) (transporting containers 8 months earlier; handling tax-unpaid whiskey 3 days earlier. Compare United States v. Fifty-Two Cases of Distilled Spirits, 62 F. Supp. 749, 750-51 (E.D. La. 1945), *aff'd sub nom.* Kent v. United States, 157 F.2d 1 (5th Cir.), *cert. denied*, 329 U.S. 785 (1946) (subsequent similar acts to show intended use of tax-paid whiskey).

[124]See Patenotte v. United States, 266 F.2d 647, 653 (5th Cir. 1959).

[125]See United States v. One 1959 Pontiac Tudor Sedan, 301 F.2d 411, 412 (5th Cir. 1962); United States v. General Motors Acceptance Corp., 239 F.2d 102, 104 (5th Cir. 1956); United States v. One 1952 Lincoln Sedan, 213 F.2d 786, 788-90 (5th Cir. 1954).

ing arrangements for an illegal sale, and in collecting the proceeds, is deemed to have been used in carrying on the business of a liquor dealer.[126] Likewise, a vehicle used to convoy another vehicle which is transporting contraband is deemed to have been used or intended for use in transporting contraband[127] and is also forfeitable.[128] On the other hand, a vehicle used solely for commuting to an illegal distillery[129] or to warn the operators of the still[130] is not used as an instrumentality in the operation of the illicit distillery and is not forfeitable.[131]

The primary purpose of the forfeiture statutes is to protect the revenue[132] and such statutes are construed less narrowly, even though a forfeiture results, than penal statutes and others involving forfeitures.[133] The forfeiture takes effect and vests title in the United States immediately upon commission of the illegal act; the condemnation when obtained relates back to that time and avoids all intermediate sales, even as to purchasers in good faith.[134] The innocence of persons having a legal or equitable interest in the vehicle at the time the offense is

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[126]United States v. One 1959 Pontiac Tudor Sedan, 301 F.2d 411 (5th Cir. 1962); United States v. One 1960 Ford Galaxie Sedan, 203 F. Supp. 387 (N.D. Ala. 1961); United States v. One 1941 Buick Coach Automobile, 85 F. Supp. 402 (S.D. Ala. 1949); *cf.* Wingo v. United States, 266 F.2d 421 (5th Cir. 1959); United States v. General Motors Acceptance Corp., 239 F.2d 102 (5th Cir. 1956).

[127]United States v. One 1952 Lincoln Sedan, 213 F.2d 726, 790 (5th Cir. 1954). *But see* First Nat'l Bank v. United States, 249 F.2d 97 (5th Cir. 1957). See also Wise v. United States, 241 F.2d 545, 547 (5th Cir. 1957). Compare United States v. Bryan, 265 F.2d 698, 701 (5th Cir. 1959) (towing offending vehicle).

[128]*Accord*, United States v. Lawson, 266 F.2d 607 (6th Cir. 1959) (active aid); Weathersbee v. United States, 263 F.2d 324 (4th Cir. 1958) (convoy car); United States v. One 1957 Ford Two-Door Sedan, 262 F.2d 651 (4th Cir. 1958) (convoy car); United States v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (4th Cir. 1958) (convoy car); United States v. One 1950 Chevrolet Four-Door Sedan, 215 F.2d 482 (10th Cir. 1954) (active aid); United States v. One Dodge Sedan, 113 F.2d 552 (3rd Cir. 1940) (convoy car).

[129]United States v. Lane Motor Co., 344 U.S. 630, 631 (1952), *affirming* 199 F.2d 495 (10th Cir. 1952), *upholding* United States v. One 1948 Plymouth Sedan, 198 F.2d 399 (3rd Cir. 1952), *overruling* United States v. One 1950 Ford Half-Ton Pickup Automobile Truck, 195 F.2d 857 (6th Cir. 1952); Burt v. United States, 283 F.2d 473, 474 (5th Cir. 1960).

[130]United States v. Jones, 194 F.2d 283, 284 (5th Cir. 1952).

[131]*Accord*, United States v. One Ford Coach, 1949 Model, 184 F.2d 749 (4th Cir. 1950) (commuting to cache); United States v. One Plymouth Sedan, 135 F.2d 922 (3rd Cir. 1943), *affirming mem.* 45 F. Supp. 46 (E.D. Pa. 1942) (commuting to still).

[132]See Florida Dealers & Growers Bank v. United States, 279 F.2d 673, 676 (5th Cir. 1960).

[133]See United States v. Ryan, 284 U.S. 167, 172 (1931).

[134]Florida Dealers & Growers Bank v. United States, 279 F.2d 673, 676 (5th Cir. 1960); *cf.* United States v. Stowell, 133 U.S. 1, 16-17 (1889); Wingo v. United States, 266 F.2d 421 (5th Cir. 1959); The Sterling, 65 F.2d 439, 440 (5th Cir. 1933).

committed is no defense to the forfeiture.[135] It is the property which is proceeded against, and the vehicle is held guilty as if it were a sentient being.[136] It is the illegal use that works the forfeiture and the guilt or innocence of the owner is immaterial.[137]

If a truck driver puts his employer's truck to illegal use, it becomes forfeited notwithstanding the innocence of the employer.[138] If the owner voluntarily delivers the vehicle to another who uses it illegally, it is forfeitable even though the owner was fraudulently induced to surrender possession.[139] The only instance in which the owner's innocence appears to be a defense to the forfeiture is where the car was stolen or taken and used without the owner's knowledge or consent.[140] The defense of theft or trespass, however, is not made out merely by showing that the owner's husband, who frequently used the car, used it without the owner's knowledge or consent on the occasion of the offense.[141] Although it has been held that an acquittal on a criminal charge is a bar to a subsequent forfeiture action based on the same facts,[142] the courts generally are reluctant to apply the doctrine and usually avoid it by finding distinguishing factors.[143]

If the court enters a decree for the claimant, the property is returned to him forthwith but he is not entitled to costs.[144] If a judgment is rendered in favor of the claimant, the court also enters a certificate of reasonable cause for the seizure, relieving the person who made the seizure of liability to suit.[145] An appeal from the judgment in the forfeiture proceeding is governed by the Federal Rules of Civil Procedure.[146]

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[135]See Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921); United States v. One Chevrolet Truck, 1934 Model, 79 F.2d 651, 652 (5th Cir. 1935); Logan v. United States, 260 Fed. 746 (5th Cir. 1918); United States v. Mincey, 254 Fed. 287 (5th Cir. 1918); *But cf.* The Dependent, 24 F.2d 538 (E.D. La. 1928).

[136]Florida Dealers & Growers Bank v. United States, 279 F.2d 673, 677 (5th Cir. 1960).

[137]See Goldsmith-Grant Co. v. United States, 254 U.S. 505, 513 (1921).

[138]United States v. Mincey, 254 F. 287 (5th Cir. 1918); *cf.* United States v. Gramling, 180 F.2d 498 (5th Cir. 1950).

[139]Beaudry v. United States, 79 F.2d 650 (5th Cir. 1935).

[140]One 1941 Oldsmobile Sedan v. United States, 161 F.2d 348, 353 (5th Cir. 1947). *But see* The Ella, 9 F.2d 411 (S.D. Fla. 1925).

[141]Oliver v. United States, 170 F.2d 142, 143 (5th Cir. 1948); *cf.* United States v. One 1960 Ford Convertible, 209 F. Supp. 247, 249 (S.D. Miss. 1962).

[142]Coffey v. United States, 116 U.S. 436 (1886).

[143]See United States v. Burch, 294 F.2d 1, 4 (5th Cir. 1961).

[144]28 U.S.C. § 2465 (1958).

[145]*Ibid.*

[146]Utley Wholesale Co. v. United States, 308 F.2d 157, 159 (5th Cir. 1962); see 7 MOORE, FEDERAL PRACTICE ¶ 81.05[6], at 4440 (2d ed. 1955); *cf.* United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 642 (5th Cir. 1952).

IV. Remission

Innocent parties are not altogether at the mercy of the uncompromising forfeiture statutes. Relief is provided in proper cases by remission or mitigation of the forfeiture. Where the forfeiture is accomplished administratively, it may be remitted or mitigated by the Secretary of the Treasury or his delegate in accordance with the provisions of the customs laws.[147] If the Secretary finds that the forfeiture was incurred without willful negligence or without any intention on the part of the claimant to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of the forfeiture, he may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.[148] The action of the Secretary in passing on an application for remission is not reviewable by the district court.[149]

Any person claiming an interest in a vehicle subject to administrative forfeiture may file with the Supervisor in Charge of the state in which the seizure was made[150] a petition, addressed to the Director, Alcohol and Tobacco Tax Division, for remission or mitigation of the forfeiture.[151] There is no standardized form provided or required by the Treasury Department, but the petition should be typewritten on legal sized paper and prepared in triplicate.[152] The petition must be executed under oath, and all copies of original documents submitted as exhibits must be certified.[153] Each copy of the petition must be accompanied by a complete set of exhibits.[154]

The petition should contain a description of the vehicle and a statement of the facts sufficient to identify the property.[155] The nature and amount of the petitioner's interest should be set forth[156] and supported by copies of the contract, bill of sale, chattel mortgage, or other appropriate documents tending to establish the petitioner's claim.[157] The petition must clearly and concisely state the facts relied on to show that the forfeiture was incurred without willful negligence or without

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147 See Int. Rev. Code of 1954, § 7327; General Fin. Co. v. United States, 45 F.2d 380, 381 (5th Cir. 1930).

148 46 Stat. 757 (1930), 19 U.S.C. § 1618 (1958).

149 General Fin. Co. v. United States, 45 F.2d 380, 381 (5th Cir. 1930); *cf.* United States v. Gramling, 180 F.2d 498, 501 (5th Cir. 1950).

150 26 C.F.R. § 172.40 (1961).

151 26 C.F.R. § 172.36 (1961).

152 26 C.F.R. § 172.37 (1961).

153 *Ibid.*

154 26 C.F.R. § 172.37 (1961).

155 26 C.F.R. § 172.38(a) (1961).

156 26 C.F.R. § 172.38(c) (1961).

157 26 C.F.R. § 172.38(f) (1961).

any intention on the part of the petitioner to defraud the revenue or to violate the law, or such other mitigating circumstances as, in the opinion of the petitioner, would justify remission or mitigation of the forfeiture.[158] If the petitioner is not the person who committed the act which caused the seizure, the petition should state how the vehicle came into the possession of the person who was responsible for the act.[159] If the petitioner had no knowledge or reason to believe that the car would be used in violation of the law, the petition should so state.[160] The petition should state also what investigation, if any, was made of the party responsible for the forfeiture through federal, state, and local law enforcement officers to determine whether such person had either a record or a reputation as a liquor law violator.[161] If such an investigation was made, the petition should set forth the information obtained, and state whether it was received before the petitioner acquired his interest in the vehicle, or before the party responsible for the seizure acquired his right in the property, whichever occurred later.[162] Reports of investigators or credit reporting agencies, affidavits, or any other papers or documents which would tend to support the claims made in the petition should be attached as exhibits.[163] Finally, the petition should contain an undertaking to pay the costs if costs are assessed as a condition of granting the petition.[164] Such costs may include the expenses of seizing and storing the vehicle, cost borne or to be borne by the United States, any taxes or penalties asserted, and the expenses of sale if the vehicle has been sold or is in the course of being sold.[165]

The petition may be filed at any time prior to the sale or other disposition of the vehicle.[166] The filing of the petition will discontinue the proceedings for disposing of the vehicle by sale, or by acquisition for official use.[167] If the vehicle has been disposed of, the petition must be filed within three months of the date of disposition.[168] In the event the petition is not filed before disposition of the vehicle, the petition must establish that the petitioner did not know of the seizure prior to the declaration of forfeiture and that he was in such circumstances as prevented him from knowing of the same.[169]

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158 26 C.F.R. § 172.38 (c) (1961).
159 26 C.F.R. § 172.38 (d) (1961).
160 *Ibid.*
161 26 C.F.R. § 172.38 (e) (1961).
162 *Ibid.*
163 26 C.F.R. § 172.38 (f) (1961).
164 26 C.F.R. § 172.38 (g) (1961).
165 *Ibid.*
166 26 C.F.R. § 172.39 (1961).
167 26 C.F.R. § 172.41 (1961).
168 26 C.F.R. § 172.39 (1961).
169 26 C.F.R. § 172.38 (b) (1961); see 46 Stat. 756 (1930), 19 U.S.C. § 1613 (1958).

Final action on the petition is taken by the Director, Alcohol and Tobacco Tax Division,[170] and the petitioner is notified by the Assistant Regional Commissioner of the allowance or denial of the petition and, in case of allowance, the conditions thereof.[171] If the petition is allowed, the vehicle may be returned to the petitioner, sold for his account or, by agreement, acquired for official use.[172] The petitioner may elect not to comply with the conditions on which the vehicle will be returned, in which case the Supervisor in Charge is authorized to sell it.[173] All costs are deducted from the proceeds of the sale, and the petitioner is paid any balance not exceeding his equity.[174]

If the forfeiture is decreed in a judicial proceeding, the court has exclusive jurisdiction to remit or mitigate the forfeiture.[175] Thus, in all cases where the value of the seized vehicle exceeds $2,500 and in all cases where the value is $2,500 or less, but a bond is posted in order to bring the forfeiture proceeding into court, the court will have exclusive jurisdiction to remit or mitigate the forfeiture.[176] The remission statute[177] confers jurisdiction on the district courts[178] and without it they are powerless to mitigate against forfeiture no matter how harsh.[179]

Any interested party can apply for remission of the forfeiture.[180] The appropriate procedure is to file with the court entertaining the libel or decreeing the forfeiture, a petition[181] alleging all the facts required for remission.[182] If a judicial forfeiture action has not been instituted the claimant for remission must follow the procedure[183] required for transferring the proceedings into court.[184]

The primary purpose of the remission statute is to relieve innocent persons whose property has been seized.[185] It is a remedial measure

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[170]26 C.F.R. § 172.43 (a) (1) (1961).

[171]26 C.F.R. § 172.43 (a) (3) (1961).

[172]26 C.F.R. § 172.43 (a) (2) (1961).

[173]26 C.F.R. § 172.44 (b) (1961).

[174]*Ibid.*

[175]18 U.S.C. § 3617 (a) (1958).

[176]United States v. One Ford Coach, 307 U.S. 219, 233 n.4, 237 (1939); see Beaudry v. United States, 92 F.2d 687, 688 (5th Cir. 1937).

[177]18 U.S.C. § 3617 (1958).

[178]One 1950 Mercury Coupe v. United States, 213 F.2d 133, 135 (5th Cir. 1954); United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 641 (5th Cir. 1952).

[179]United States v. One 1955 Model Ford 2-Door Coach, 261 F.2d 125, 127 (5th Cir. 1952).

[180]United States v. McArthur, 117 F.2d 343, 344 (5th Cir. 1941).

[181]E.g., 4 WEST, FEDERAL FORMS § 5934B (Darnieder ed., Supp. 1962).

[182]See 47 C.J.S. *Internal Revenue* § 966, at 1228-29 & n.99 (1946).

[183]Note 26 *supra* and accompanying text.

[184]See Fishburn v. Jackson, 55 F.2d 934, 936 (N.D. Tex. 1932); 47 C.J.S. *Internal Revenue* § 966, at 1229 n.99 (1) (1946).

[185]Florida Dealers & Growers Bank v. United States, 279 F.2d 673, 676 (5th Cir. 1960).

enacted in recognition of the fact that in many instances the drastic remedy of forfeiture may be unjust, and is intended to afford relief to innocent parties where their claims are just and reasonable.[186] The statute is to be liberally construed to carry out its objective.[187] Both the forfeiture and remission statutes, however, must be construed as far as possible so as to give effect to the purpose of each without sacrificing either,[188] and the protection of the revenue is a proper matter for consideration whenever remission is sought.[189]

The statute provides that the court shall not allow any claim for remission or mitigation unless and until the claimant proves:

> (1) that he has an interest in such vehicle . . . , as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any state relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any state relating to liquor has a right with respect to such vehicle . . . , that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement of the locality in which such other person then resided, and of each locality in which the claimant had made any other inquiry as to the character or financial standing of such other person that such other person had no such record or reputation.[190]

The statute vests a discretionary power of remission in the district court which becomes operative only when the statutory conditions have been fulfilled.[191] Compliance with all three conditions precedent to remission must be proved by the claimant before the district court has

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[186]United States v. Farrior Motor Co., 198 F.2d 68, 70 (1952).

[187]United States v. One Ford Coach, 307 U.S. 219, 226 (1939).

[188]Florida Dealers & Growers Bank v. United States, 279 F.2d 673, 677 (5th Cir. 1960).

[189]United States v. One Ford Coach, 307 U.S. 219, 226 (1939).

[190]18 U.S.C. § 3617(b) (1958).

[191]United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 642 (5th Cir. 1952); see One 1950 Mercury Coupe v. United States, 213 F.2d 133, 135 (5th Cir. 1954); One 1951 Chevrolet Pickup Truck v. United States, 212 F.2d 662, 663 (5th Cir. 1954); United States v. Dodd, 205 F.2d 260, 262 (5th Cir. 1953).

any right to remit or mitigate a forfeiture.[192] The granting of relief under the statute is not a matter of equity and therefore the court has no power to relax the express provisions of the statute.[193] The conditions must be literally complied with[194] and substantially fulfilled.[195]

Remission is not a matter of right, however, and even though all the statutory conditions are met, whether there shall be a remission or mitigation is still within the sound discretion of the court.[196] Although it may do so, the court is not compelled to exercise its discretion in remitting a forfeiture where the minimum statutory conditions are complied with if there are facts and circumstances which give an unsatisfactory color or character to the transaction.[197] Fulfillment of the conditions precedent permits the court to exercise its discretion, and equity and good conscience then become the controlling considerations.[198] If the claimant has been negligent, or in good conscience ought not to be relieved, the court should deny his application,[199] and the court's exercise of discretion in refusing or granting a remission will be reviewed only in the most extreme case.[200]

In order to secure the relief provided by the statute, it is incumbent on the claimant to prove not only that he had no knowledge that his automobile was being used or would be used in violation of the liquor laws, but also that he had no reason to believe that it would be so used.[201]

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[192]United States v. One 1950 Dodge Sedan, 211 F.2d 738, 739 (5th Cir. 1954); United States v. One 1941 Model Ford Coach, 138 F.2d 506 (5th Cir. 1943); see United States v. Federal Credit Co., 117 F.2d 341, 342-43 (5th Cir. 1941).

[193]United States v. One 1950 Model Ford 2-Door Coach, 261 F.2d 125, 127 (5th Cir. 1958); United States v. Dodd, 205 F.2d 260, 262 (5th Cir. 1953); United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 642 (5th Cir. 1952).

[194]United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 642 (5th Cir. 1952).

[195]One 1950 Mercury Coupe v. United States, 213 F.2d 133, 136 (5th Cir. 1954); Murdock Acceptance Corp. v. United States, 172 F.2d 552, 553 (5th Cir. 1949).

[196]United States v. Automobile Financing, Inc., 99 F.2d 498, 499 (5th Cir. 1938), *aff'd sub nom.* United States v. One Ford Coach, 307 U.S. 219 (1939); United States v. One Ford Coach, 93 F.2d 771, 774 (4th Cir.), *aff'd by an equally divided Court mem.* 305 U.S. 564 (1938), *aff'd on rehearing*, 307 U.S. 219 (1939). *But see* Murdock Acceptance Corp. v. United States, 350 U.S. 488 (1956), *reversing* 218 F.2d 702 (5th Cir. 1955).

[197]Beaudry v. United States, 106 F.2d 987, 988 (5th Cir. 1939).

[198]See Florida Dealers & Growers Bank v. United States, 279 F.2d 673, 677 (5th Cir. 1960).

[199]United States v. One Ford Coach, 307 U.S. 219, 226 (1939); United States v. Dodd, 205 F.2d 260, 262 (5th Cir. 1953); United States v. One 1938 Model Chevrolet Coach, 106 F.2d 985, 987 (5th Cir. 1939); United States v. One 1955 Model Ford Sedan, 161 F. Supp. 817, 818 (S.D. Ala. 1958) (denied for failure to investigate spouse of impecunious purchaser); see United States v. One 1956 Model 4-Door Pontiac Catalina Automobile, 159 F. Supp. 955 (M.D. Ga. 1957) (denied for failure to investigate spouse of purchaser active in negotiations).

[200]Beaudry v. United States, 106 F.2d 987, 988 (5th Cir. 1939).

[201]United States v. Dodd, 205 F.2d 260, 262 (5th Cir. 1953).

Where the claimant has actual knowledge that the person entrusted with possession has a record and reputation for violating the liquor laws, he has reason to anticipate improper use of the vehicle and is not entitled to remission.[202] On the other hand, such knowledge coming to the claimant when he can no longer, by the exercise of diligence and good faith, do anything about it, will not deprive him of the benefits of the statute.[203]

If it is established that the claimant's interest arises out of an agreement under which a person having a record or reputation for violating the liquor laws has a right in the vehicle, then the claimant must show that before he acquired his interest he made inquiry and was informed that such person had no record or reputation.[204] The burden is on the Government first to show a record or reputation, but then the burden shifts to the claimant to show compliance with the condition of the statute.[205]

It is incumbent on the claimant to show that he made inquiry in both the locality where his interest was acquired and the place of residence of the other party.[206] If such other person's known place of residence differs from the place given by him, such knowledge may require the claimant to extend his investigation to include both places.[207] The inquiry must be made also in any locality in which a character or financial investigation is made.[208]

To comply with the inquiry condition of the statute, the claimant is required to make inquiry of only one of the several officers enumerated,[209] and a negative reply from the federal office having jurisdiction

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[202]See United States v. One 1950 Model Mercury Sedan Automobile, 207 F.2d 528, 529 (5th Cir. 1953); United States v. Dodd, 205 F.2d 260, 261-62 (5th Cir. 1953).

[203]United States v. Farrior Motor Co., 198 F.2d 68, 71 (5th Cir. 1952). Compare Florida Dealers & Growers Bank, 279 F.2d 673, 677 (5th Cir. 1960).

[204]See United States v. General Motors Acceptance Corp., 296 F.2d 246, 247-48 (5th Cir. 1961); Murdock Acceptance Corp. v. United States, 172 F.2d 552 (5th Cir. 1949).

[205]United States v. General Motors Acceptance Corp., 296 F.2d 246, 248 (5th Cir. 1961); United States v. One 1955 Ford 4-Door, 186 F. Supp. 547, 550 (E.D. Tex. 1960); see Murdock Acceptance Corp. v. United States, 172 F.2d 552, 553 (5th Cir. 1949). Compare Associates Discount Corp. v. United States, 200 F.2d 537 (5th Cir. 1952).

[206]See United States v. Federal Credit Co., 117 F.2d 341, 342 (5th Cir. 1941); United States v. One 1960 Model Ford Truck, 189 F. Supp. 913, 915 (N.D. Ala. 1960).

[207]See United States v. One 1960 Ford Pickup Truck, 306 F.2d 106, 107 (5th Cir. 1962).

[208]United States v. 1941 Model Ford Coach, 138 F.2d 506-07 (5th Cir. 1943).

[209]Murdock Acceptance Corp. v. United States, 350 U.S. 488, 490-91 (1956), *reversing* 218 F.2d 702 (5th Cir. 1955); United States v. General Motors Acceptance Corp., 296 F.2d 246, 248 (5th Cir. 1961); One 1950 Mercury Coupe v. United States, 213 F.2d 133, 135 (5th Cir. 1954); One 1951 Chevrolet Pickup Truck v. United States, 212 F.2d 662, 663 (5th Cir. 1954); United States v. Federal Credit Co., 117 F.2d 341, 343 (5th Cir. 1941).

over all the requisite localities relieves the claimant of making further inquiry of local law enforcement officers.[210] If the claimant relies on a local inquiry, it must be made of a principal law enforcement officer specified by the statute, and an inquiry at a county judge's office[211] or through a local credit bureau[212] does not satisfy the statute.

Both record and reputation are necessary subjects of inquiry,[213] and an inquiry as to record only is insufficient.[214] The answer must be in the negative; that is, that the person has no such record or reputation as a liquor violator.[215] If the answer is that the person inquired about has a conviction four years earlier but a current good reputation, the court will not have authority to remit a subsequent forfeiture.[216] An arrest and indictment followed by a nolle prosequi does not constitute a record or reputation within the intent of the statute.[217] A reputation for violating only state liquor laws, even when such violations are openly tolerated by local law enforcement officers, is such a reputation, however, as will preclude remission.[218] The reputation referred to by the statute does not mean general reputation, but reputation among law enforcement officers.[219] It does, however, contemplate reputation not only with the enumerated officers but with all the employees and investigators under their jurisdiction.[220] The

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[210]See Murdock Acceptance Corp. v. United States, 350 U.S. 488, 490-91 (1956), *reversing* 218 F.2d 702 (5th Cir. 1955); United States v. One 1955 Model 2-Door Coach, 261 F.2d 125, 126-27 (5th Cir. 1958).

[211]See United States v. One 1950 Dodge Sedan, 211 F.2d 738 (5th Cir. 1954).

[212]United States v. One 1960 Ford Pickup Truck, 306 F.2d 106, 108 (5th Cir. 1962).

[213]One 1950 Mercury Coupe v. United States, 213 F.2d 133, 136 (5th Cir. 1954); United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 642 (5th Cir. 1952); see United States v. One 1960 Ford Pickup Truck, 306 F.2d 106 (5th Cir. 1962).

[214]One 1950 Mercury Coupe v. United States, 213 F.2d 133, 136 (5th Cir. 1954); *cf.* Associates Discount Corp. v. United States, 200 F.2d 537 (5th Cir. 1952).

[215]United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 642 (5th Cir. 1952).

[216]*Id.* at 641.

[217]United States v. General Motors Acceptance Corp., 296 F.2d 246, 249 (5th Cir. 1961). Compare United States v. One 1955 Ford 4-Door, 186 F. Supp. 547, 551 (E.D. Tex. 1960) (conviction under an alias not a record); United States v. One 1956 Model 4-Door Pontiac Catalina Automobile, 159 F. Supp. 955, 957 (M.D. Ga. 1957) (conviction under previous married name is a record).

[218]United States v. One 1952 Chevrolet Pickup Truck, 213 F.2d 797 (5th Cir. 1954); see United States v. One 1950 Model Mercury Sedan Automobile, 207 F.2d 528, 529 (5th Cir. 1953).

[219]United States v. One 1946 Mercury Sedan Automobile, 100 F. Supp. 957, 960 (N.D. Ga. 1951), *aff'd sub nom.* United States v. Frank Graham Co., 199 F.2d 499 (5th Cir. 1952).

[220]One 1951 Chevrolet Pickup Truck v. United States, 212 F.2d 662, 664 (5th Cir. 1954); see Murdock Acceptance Corp. v. United States, 172 F.2d 552, 553 (5th Cir. 1949).

inquiry must be made in such reasonably close proximity of time before the claimant acquired his interest that in the very nature of things a person could not get a record or reputation in the interim between inquiry and acquisition.[221]

If the claimant fails to make inquiry before he acquires his interest, he is bound by the answer which would have been given by any one of the specified officers had the inquiry been made.[222] Furthermore, the fact that if inquiry had been made, the reply would have been negative,[223] or that the person inquired about was unknown,[224] does not excuse the claimant's failure to inquire if the party in fact had a record or reputation at the time. If the inquiry would have disclosed that the person inquired about was the spouse of a known bootlegger,[225] or that he lived in a house which had the reputation of being the center of an illicit whiskey business,[226] the claimant's failure to inquire defeats his claim for remission. Ignorance of the person's bad reputation,[227] or even a positive belief in his good reputation,[228] will not excuse the claimant's failure to make inquiry.

The claimant is not required, however, to investigate the transaction in which he acquired his interest to determine whether an ostensible purchaser, who has no record or reputation, is merely a "straw"

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[221]United States v. One 1955 Model Ford 2-Door Coach, 261 F.2d 125, 128 (5th Cir. 1958) (7 month unreasonably long as matter of law).

[222]United States v. General Motors Acceptance Corp., 296 F.2d 246, 248 (5th Cir. 1961); One 1951 Chevrolet Pickup Truck v. United States, 212 F.2d 662, 663 (5th Cir. 1954); see United States v. One 1960 Ford Pickup Truck, 306 F.2d 106 (5th Cir. 1962); United States v. McArthur, 117 F.2d 343, 344 (5th Cir. 1941); United States v. One 1950 Mercury Montclair 4-Door Sedan, 185 F. Supp. 44 (N.D. Fla. 1960) (record at former place of residence); United States v. One 1953 Model Mercury Sedan Automobile, 149 F. Supp. 657 (S.D. Ala. 1957).

[223]One 1951 Chevrolet Pickup Truck v. United States, 212 F.2d 662, 664 (5th Cir. 1954); see United States v. One 1956 Model 4-Door Pontiac Catalina Automobile, 159 F. Supp. 955 (M.D. Ga. 1957). *But see* United States v. One 1955 Ford 4-Door, 186 F. Supp. 547 (E.D. Tex. 1960).

[224]Murdock Acceptance Corp v. United States, 172 F.2d 552, 553 (5th Cir. 1949).

[225]General Motors Acceptance Corp. v. United States, 249 F.2d 183, 185 n.2 (5th Cir. 1957); see United States v. One 1955 Model Ford Sedan, 161 F. Supp. 817 (S.D. Ala. 1958).

[226]See One 1951 Chevrolet Pickup Truck v. United States, 212 F.2d 662, 664 (5th Cir. 1954).

[227]United States v. Bond Finance Co., 219 F.2d 534, 535 (5th Cir. 1955). *But see* United States v. One 1936 Model V-8 Ford Coach, 58 F. Supp. 805, 806 (S.D. Ga. 1945); United States v. One 1936 Model Ford Coach Automobile, 58 F. Supp. 802, 804 (M.D. Ga. 1944).

[228]United States v. McArthur, 117 F.2d 343, 344 (5th Cir. 1941); see United States v. One 1953 Model Mercury Sedan Automobile, 149 F. Supp. 657, 658 (S.D. Ala. 1957).

for the real purchaser who does have a record or reputation.[229] Nevertheless, the claimant may be required to extend his investigation beyond the record and reputation of the ostensible purchaser if the documents or surrounding circumstances under which he acquired his interest would lead a reasonably prudent person to make a further investigation to ascertain the existence of secret or covered interests.[230] In such circumstances, the knowledge of an automobile salesman that the transaction is in reality a "straw purchase" is imputed to the dealer for whom he acts, and the dealer is thereby precluded from obtaining remission, not because he failed to investigate the real but concealed purchaser, but because he had knowledge or reason to believe that the vehicle would be used in violating the law.[231] Whether the knowledge of the dealer is likewise imputable to the finance company which purchases the contract, the Court of Appeals for the Fifth Circuit has declined to consider.[232] It appears, however, that the finance company will not be constructively charged with the knowledge of the dealer where the company undertakes to comply with the statute by conducting its own independent investigation of the ostensible purchaser rather than relying on the dealer for fulfillment of this condition.[233]

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[229]United States v. One Ford Coach, 307 U.S. 219 (1939); United States v. Williams, 200 F.2d 500 (5th Cir. 1952); see United States v. One 1938 Model Chevrolet Coach, 106 F.2d 985, 987 (5th Cir. 1939); United States v. One 1936 Model Ford Deluxe Tudor Automobile, 22 F. Supp. 507 (N.D. Ga. 1938).

[230]United States v. Automobile Financing, Inc., 99 F.2d 498, 500 (5th Cir. 1938), *aff'd sub nom.* United States v. One Ford Coach, 307 U.S. 219 (1939); see United States v. One 1955 Model Ford Sedan, 161 F. Supp. 817 (S.D. Ala. 1958) (purchaser financially incapable of making payments alone); United States v. One 1956 Model 4-Door Pontiac Catalina Automobile, 159 F. Supp. 955, 958-59 (M.D. Ga. 1957) (another equally active in purchase negotiations).

[231]See Beaudry v. United States, 106 F.2d 987 (5th Cir. 1939); United States v. One 1956 Model 4-Door Pontiac Catalina Automobile, 159 F. Supp. 955, 958 (M.D. Ga. 1957); United States v. One 1955 Model Buick Coupe Automobile, 145 F. Supp. 72, 78 (S.D. Ga. 1956), *aff'd on other grounds sub nom.* General Motors Acceptance Corp. v. United States, 249 F.2d 183 (5th Cir. 1957). Compare General Finance & Thrift Co. v. United States, 226 F.2d 735 (5th Cir. 1955).

[232]General Motors Acceptance Corp. v. United States, 249 F.2d 183, 185 (5th Cir. 1957). *But cf.* General Finance & Thrift Co. v. United States (226 F.2d 735, 737 (5th Cir. 1955).

[233]See United States v. One Ford Coupe, 307 U.S. 219 (1939) (by implication), *affirming sub nom.* United States v. Automobile Financing, Inc., 99 F.2d 498 (5th Cir. 1938), *affirming sub nom.* United States v. One 1936 Model Ford DeLuxe Tudor Automobile, 22 F. Supp. 507, 509 (N.D. Ga.); One 1954 Model Chevrolet Tudor Coach, 137 F. Supp. 178 (S.D. Ala. 1955). See also One 1955 Model Buick Coupe Automobile v. United States, 145 F. Supp. 72, 78-79 (S.D. Ga. 1956), *aff'd on other grounds sub nom.* General Motors Acceptance Corp. v. United States, 249 F.2d 183 (5th Cir. 1957) (company failing to make independent inquiry charged with dealer's knowledge). Compare United States v. One 1956 Model 4-Door Pontiac Catalina Automobile, 159 Fed. 955, 958 (M.D. Ga. 1957).

Although it may be considered by the court in exercising its discretion, the fact that the finance company may have recourse against the dealer for its loss does not deprive the company of the right to remission.[234]

The provision of the statute requiring the inquiry applies only to commercial transactions,[235] and primarily to those doing a banking, financing or other similar type of business involving lending money with the vehicles as security for the loan, in which it is customary to make credit inquiries about those who are to have possession of the vehicle.[236] Therefore, where the claimant is a gratuitous bailor[237] or an automobile rental agency[238] it is not necessary to show compliance with the section of the statute relating to the so-called "bootleg hazard" investigation. Nevertheless, a gratuitous bailor who has actual knowledge of the record or reputation of the bailee may be denied remission under that provision of the statute requiring the claimant to show that he had no knowledge or reason to believe that the vehicle would be used in violation of the law.[239]

The successful claimant for remission is required to pay all the expenses incident to the seizure and forfeiture incurred by the United States before he is entitled to return of the vehicle.[240] The return of the vehicle does not divest the court of jurisdiction of an appeal from the order granting remission,[241] and such appeals are governed by the Federal Rules of Civil Procedure.[242]

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[234]United States v. Williams, 200 F.2d 500, 501 (5th Cir. 1952); United States v. One 1955 Model Buick Coupe Automobile, 145 F. Supp. 72, 81 (S.D. Ga. 1956), *aff'd sub nom.* General Motors Acceptance Corp. v. United States, 249 F.2d 183 (5th Cir. 1957).

[235]United States v. One 1946 Mercury Sedan Automobile, 100 F. Supp. 957, 960 (N.D. Ga. 1951), *aff'd sub nom.* United States v. Frank Graham Co., 199 F.2d 499 (5th Cir. 1952).

[236]See United States v. Rent-A-Car Service, 239 F.2d 379, 381 (5th Cir. 1956).

[237]United States v. Dodd, 205 F.2d 260, 261 (5th Cir. 1953); United States v. One 1946 Mercury Sedan Automobile, 100 F. Supp. 957, 960 (N.D. Ga. 1951), *aff'd sub nom.* United States v. Frank Graham Co., 199 F.2d 499 (5th Cir. 1952); United States v. One 1949 Chevrolet Pickup Truck, 111 F. Supp. 236 (S.D. Miss. 1953).

[238]United States v. Rent-A-Car Service, 239 F.2d 379, 381 (5th Cir. 1956).

[239]United States v. One 1950 Model Mercury Sedan Automobile, 207 F.2d 528, 529 (5th Cir. 1953); United States v. Dodd, 205 F.2d 260, 261-62 (5th Cir. 1953); United States v. One 1946 Mercury Sedan Automobile, 100 F. Supp. 957, 961 (N.D. Ga. 1951), *aff'd sub nom.* United States v. Frank Graham Co., 199 F.2d 499 (5th Cir. 1952); see United States v. One 1960 Ford Convertible, 209 F. Supp. 247, 249 (S.D. Miss. 1962); *cf.* United States v. One 1952 Chevrolet Pickup Truck, 213 F.2d 797 (5th Cir. 1954); United States v. One 1936 Model Ford Coach Automobile, 58 F. Supp. 802, 804 (M.D. Ga. 1944).

[240]18 U.S.C. § 3617(c) (1958).

[241]United States v. One 1950 Lincoln Sedan, 196 F.2d 639, 642 (5th Cir. 1952).

[242]7 MOORE, FEDERAL PRACTICE 81.05[6], at 4440 (2d ed. 1955).

V. Conclusion

The forfeiture statutes are frequently denounced as harsh and unjust. When considered closely and with the remission statute, however, they appear as reasonable provisions for the protection of the revenue. Of the individual they require only that he not knowingly or negligently lend his automobile to the defrauding of the treasury. Of financial institutions, which customarily take measures to protect themselves in their dealings with strangers, they require only the additional affirmative precaution of inquiring as to the possible unlawful use of the automobile. In short, the statutes require merely that responsible individuals see after their own interests or suffer the consequences. While this concept may be outmoded, it is not yet generally considered unjust.

FORMATION, OPERATION AND DISSOLUTION OF BUSINESS CORPORATIONS

*Martin R. McLendon**

I. General

When the Mississippi Business Corporation Act,[1] became effective on January 1, 1963,[2] Mississippi joined the growing number of states operating under some or all of the provisions of the model act.[3] Except for the franchise tax features, which are administered by the State Tax Commission,[4] and changes made to conform to the requirements of the Constitution of 1890 and public policy, the act passed by the Mississippi Legislature follows closely the provisions of the model act. For that reason, the publication[5] edited by the Committee on Corporate Law of the American Bar Association[6] should be most helpful to the members of the Mississippi Bar in their corporate practice.

This paper is limited to a general discussion of some of the provisions of the act dealing with the formation, operation and dissolution of business corporations. Nonprofit corporations are not included for the reason that the legislature completely separated the statutes dealing with that type corporation[7] from those dealing with business corporations.

II. Formation

Authority to do business as a corporation may be secured by any two or more adult natural persons by preparing, signing, verifying and delivering, in duplicate, articles of incorporation to the Secretary of State.[8] The form to be used in preparing articles of incorporation is prescribed.[9]

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*Assistant Attorney General, State of Mississippi, speech delivered to Mississippi State Bar Association meeting, June 15, 1962.

[1]Miss. Code Ann. § 5309 (Supp. 1963).

[2]Miss. Code Ann. § 5309-317 (Supp. 1963).

[3]ALI, Model Business Corporations Act (1950), prepared by the Committee on Corporate Law, section on Corporation, Banking and Business Law of the American Bar Association.

[4]Miss. Code Ann. §§ 9312-40 (1952).

[5]ALI, Model Business Corporations Act (1950).

[6]Leonard D. Atkins, Chairman.

[7]See Miss. Code Ann. § 5310.1 (Supp. 1963); Miss. Code Ann. §§ 5319-20, 5322-24 (Supp. 1963).

[8]Miss. Code Ann. § 5309-121 (Supp. 1963).

[9]Miss. Code Ann. § 5309-122 (Supp. 1963).

The articles of incorporation must set forth:

"(a) The name of the corporation."[10] The name chosen must not be identical with or so similar to the name of an existing corporation as to be misleading and must conform to other limitations.[11] The use of a name may be reserved[12] or registered,[13] and names so reserved or registered are protected during the time for which the reservation or registration is effective.

"(b) The period of duration, which may not exceed ninety-nine (99) years."[14] This limitation on the period of existence of corporations organized for pecuniary gain is required by the constitution.[15] However, this period is extended for two years[16] for certain purposes and may be extended by amendment for an additional period of ninety-nine years.[17]

"(c) The specific purpose or purposes for which the corporation is organized, stated in general terms."[18] General business corporations for every lawful purpose, except the operation of a railroad other than street railroads, the carrying on of an insurance business, industrial and business development, and for other purposes provided for by general statutes for special types of corporations may be created under the provisions of this act.[19] This article will be complete if it contains a brief statement of the type of business or businesses to be carried on by the corporation. It is not necessary to state in minute detail each phase of the activities that the corporation purposes to undertake.

> (d) The aggregate number of shares which the corporation shall have authority to issue; if such shares are to consist of one class only, the par value of each of such shares, or a statement that all of such shares are without par value; or, if such shares are to be divided into classses, the number of shares of each class, and a statement of the par value of the shares of each such class or that such shares are to be without par value.[20]

A statement of the financial organization of the corporation must be made in this article. Such statement should include the number of shares to be issued and the par value thereof, unless the shares are to be without par value, in which event only the number of such shares that may be issued should be stated. If more than one class of stock

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[10] MISS. CODE ANN. § 5309-122 (a) (Supp. 1963).
[11] MISS. CODE ANN. § 5309-11 (c) (Supp. 1963).
[12] MISS. CODE ANN. § 5309-12 (Supp. 1963).
[13] MISS. CODE ANN. § 5309-13 (Supp. 1963).
[14] MISS. CODE ANN. § 5309-122 (b) (Supp. 1963).
[15] MISS. CONST. art. 7, § 178.
[16] MISS. CODE ANN. § 5039-212 (Supp. 1963).
[17] MISS. CODE ANN. § 5309-131 (Supp. 1963).
[18] MISS. CODE ANN. § 5309-122 (c) (Supp. 1963).
[19] MISS. CODE ANN. § 5309-03 (Supp. 1963).
[20] MISS. CODE ANN. § 5309-122 (d) (Supp. 1963).

is to be issued the number of shares and the par value per share of each class to be issued should be set forth in this article. No stock may be sold for less than one dollar per share. The consideration to be paid for shares without par value may be fixed by the board of directors, unless the articles of incorporation reserve that right to the shareholders.[21]

"(e) If the shares are to be divided into classes, the designation of each class and a statement of the preference, limitations and relative rights, if any, in respect of the shares of each class."[22] In the event the shares of the corporation are to be divided into classes with designations, preferences, limitations or relative rights, the details thereof should be stated in this article for each such class.[23]

> (f) If the corporation is to issue the shares of any preferred or special class in series, then the designation of each series and a statement of the variation in the relative rights and preferences as between series insofar as the same are to be fixed in the articles of incorporation, and a statement of any authority to be vested in the board of directors to establish series and fix and determine the variations in the relative rights and preferences as between series.[24]

If preferred shares or special classes of shares are to be issued in series, the classes, preferences and relative rights thereof must be stated in detail in this article. In the event no preferred shares or special classes in series are to be issued, this article also may be completed by the statement "not applicable."[25]

"(g) A statement that the corporation will not commence business until consideration of the value of at least One Thousand Dollars ($1,000.00) has been received for the business of shares."[26] This is the minimum paid in capital that a corporation must have in order to begin business and is not to be considered a limitation on the amount of such capital.[27]

"(h) Any provision granting to shareholders the preemptive right to acquire additional or treasury shares of the corporation."[28] Without a statement granting to existing shareholders preemptive right to purchase shares subsequently issued, no such right will exist.[29]

(i) Any provision, not inconsistent with law, which the incor-

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[21] MISS. CODE ANN. § 5309-34 (Supp. 1963).
[22] MISS. CODE ANN. § 5309-122 (e) (Supp. 1963).
[23] MISS. CODE ANN. § 5309-31 (Supp. 1963).
[24] MISS. CODE ANN. § 5309-122 (f) (Supp. 1963).
[25] See MISS. CODE ANN. § 5309-33 (Supp. 1963).
[26] MISS. CODE ANN. § 5309-122 (g) (Supp. 1963).
[27] MISS. CODE ANN. § 5309-125 (Supp. 1963).
[28] MISS. CODE ANN. § 5309-122 (n) (Supp. 1963).
[29] MISS. CODE ANN. § 5309-52 (Supp. 1963).

porators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision restricting the transfer of shares and any provision which under this Act is required or permitted to be set forth in the by-laws.[30]

Unless the articles reserve to the shareholders the right to alter or amend the bylaws, that right will be vested in the board of directors.[31] A quorum for shareholders meetings shall be a simple majority of the outstanding shares unless a smaller or greater number be provided in the articles of incorporation to constitute a majority,[32] and each share of the corporation shall have one vote unless the voting rights of preferred shares is limited or denied by the articles of incorporation.[33] Voting rights may not be denied to common shares.[34] The board of directors shall have the right to fix their compensation unless otherwise provided in the articles of incorporation.[35] A simple majority of the directors shall constitute a quorum for the transaction of their business unless the articles of incorporation provide for a different majority.[36] If the articles of incorporation so provide, the board of directors may designate executive or other committees.[37]

Distribution of the assets of the corporation is controlled by the terms of the statute,[38] but provisions for certain distributions may be provided in the articles of incorporation,[39] and the directors may be liable for distribution contrary to such restrictions.[40] The articles of incorporation may provide that shares that have been redeemed or purchased by the corporation shall not be reissued, in which case the filing of a statement of cancellation[41] shall constitute an amendment to articles of incorporation and thereby reduce the number of shares authorized to be issued. In the event no such restriction or bylaw material is to be included in the articles of incorporation, this article may be completed by inserting therein the word "none."

"(j) The street and post office address of its initial registered office, and the name of its initial registered agent at such address."[42]

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[30]MISS. CODE ANN. § 5309-122 (i) (Supp. 1963).
[31]MISS. CODE ANN. § 5309-53 (Supp. 1963).
[32]MISS. CODE ANN. § 5309-58 (Supp. 1963).
[33]MISS. CODE ANN. § 5309-59 (Supp. 1963).
[34]MISS. CONST. art 4, § 194; MISS. CODE ANN. § 5309-59 (Supp. 1963).
[35]MISS. CODE ANN. § 5309-71 (Supp. 1963).
[36]MISS. CODE ANN. § 5309-76 (Supp. 1963).
[37]MISS. CODE ANN. § 5309-77 (Supp. 1963).
[38]See MISS. CODE ANN. §§ 5309-81 to 83, 91 (Supp. 1963).
[39]MISS. CODE ANN. §§ 5309-81 (b), 82 (b) (Supp. 1963).
[40]MISS. CODE ANN. § 5309-92 (Supp. 1963).
[41]MISS. CODE ANN. § 5309-142 (Supp. 1963).
[42]MISS. CODE ANN. § 5309-122 (j) (Supp. 1963).

A registered office and registered agent are required to be maintained at all times[43] and they may be changed[44] from time to time.

"(k) The number of directors constituting the initial board of directors and the names and street and post office addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors be elected and qualify."[45] The initial board of directors shall be not less than three in number who shall serve until the first meeting of the shareholders.[46] Classification of directors may be provided for in the articles of incorporation,[47] but such classification may not be made until the first meeting of the shareholders.

"(l) The name and street and post office address of each incorporator. It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated by this Act."[48] The provision of the article dealing with the incorporators is self-explanatory. However, in communities not having street addresses the post office address of the incorporators will be sufficient. The powers of domestic business corporations are clearly set forth,[49] and it is not necessary that any of the powers so enumerated be spelled out in this or any other article of the corporation. Under the new act, it is not necessary or desirable for the articles of incorporation to contain directions as to how its provisions will be construed or other high sounding and ambiguous phrases from form books.

"(m) If the articles of incorporation are for a street railway, telegraph or telephone company, a description of the line and the points it will traverse."[50] A general statement giving the terminal and immediate points to be covered by a street railway, telegraph, or telephone company is all that is required by this article. The words "not applicable" should be inserted in this article of the form if the form be used[51] and the corporation is not for one of the special purposes above stated. When duplicate articles of incorporation have been properly prepared, executed, delivered and filed, and when all fees have been paid, the Secretary of State shall endorse the articles as filed, retain one copy in his office and issue a certificate of incorporation, mailing it with the other duplicate original to the incorporators or their

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[43] MISS. CODE ANN. § 5309-21 (Supp. 1963).
[44] MISS. CODE ANN. § 5309-22 (Supp. 1963).
[45] MISS. CODE ANN. § 5309-122(k) (Supp. 1963).
[46] MISS. CODE ANN. § 5309-72 (Supp. 1963).
[47] MISS. CODE ANN. § 5309-73 (Supp. 1963).
[48] MISS. CODE ANN. § 5309-122(l) (Supp. 1963).
[49] MISS. CODE ANN. § 5309-04 (Supp. 1963).
[50] MISS. CODE ANN. § 5309-122(m) (Supp. 1963).
[51] MISS. CODE ANN. § 5309-287 (Supp. 1963).

representative.[52] When the certificate of incorporation has been returned, the corporate existence shall begin,[53] and the corporation may begin to transact its business when the minimum sum of $1,000 has been paid into the corporation.[54] The articles of incorporation must be recorded in the office of the chancery clerk of the county in which the principal office of the corporation is to be located.[55]

The expenses of organization may be paid,[56] subscription books may be opened,[57] or if preincorporation subscription was made, subscription for shares may be called. The initial board of directors named in the articles of incorporation may meet for the purpose of adopting bylaws, electing officers and transacting other business which may come before the meeting on three days' notice,[58] or the meeting may be held after waiver of notice.[59]

III. Operation

Of course the primary if not the sole purpose of the formation of a business corporation is to make a profit for the shareholders by rendering a service to the business world. Many sections of the new act dealing with the internal operation of domestic corporations are directed to that purpose, with proper safeguards for the protection of creditors and shareholders.

A private publication[60] comparing the old and new Mississippi corporation laws shows that there are no less than twenty-five major provisions provided for by the new act which have no counterpart in the old statute. Most of these new enactments deal with *operation* of business corporations, a topic on which the old statute is silent. It would unduly lengthen this discussion to attempt to cover in detail the many areas that will be provided for by statute when the new act takes effect. However, a general discussion of the operation of business corporations under the new act is desirable, because the provisions of the act apply to existing corporations.[61]

Except as provided by statute and the articles of incorporation, the business and affairs of a corporation are under the direct control of

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[52]Miss. Code Ann. § 5309-123 (Supp. 1963).

[53]Miss. Code Ann. § 5309-124 (Supp. 1963).

[54]Miss. Code Ann. § 5309-125 (Supp. 1953).

[55]Miss. Const. art. 7, § 189; Miss. Laws 1962, Ch. 235, § 51 at 379.

[56]Miss. Code Ann. § 5309-38 (Supp. 1963).

[57]Miss. Code Ann. § 5309-33 (Supp. 1963).

[58]Miss. Code Ann. § 5309-126 (Supp. 1963).

[59]Miss. Code Ann. § 5309-302 (Supp. 1963).

[60]C. T. System, Mississippi: Comparison of Features of Old and New Business Corporation Laws (1963).

[61]Miss. Code Ann. § 5309-311 (Supp. 1963).

the board of directors.[62] The board shall organize,[63] and for continuity in the affairs of the corporation, the terms of office of the directors may be classified and staggered.[64] The board of directors is authorized to elect officers of the corporation,[65] and to remove them, when in the judgment of the board such removal is for the best interest of the corporation.[66] The board of directors may fill vacancies created by death or resignation.[67] Board members may be removed by the shareholders.[68] Unless authority is reserved to the shareholders in the articles of incorporation, the board of directors may alter and amend the bylaws which are adopted initially by the board.[69]

The officers and directors shall answer interrogatories propounded by the Secretary of State,[70] and such interrogatories and answers shall not be open to public inspection.[71] The board of directors may hold regular meetings with or without notice[72] and a majority of the total board shall constitute a quorum[73] for the transaction of business. If the articles of incorporation or bylaws so provide, the board of directors may appoint executive or other committees and delegate to them limited responsibilities of the board.[74] The appointment of such committees shall not serve to relieve the directors of the responsibilities imposed upon them by law, some of which are specifically spelled out by statute,[75] nor shall they be delegated authority in reference to charter amendments, sale of assets, mergers or dissolution. The board of directors may sell or mortgage the assets of the corporation in the regular course of business without the consent of the shareholders,[76] but the sale or mortgage of assets not in the regular course of business may be made only with shareholder approval.[77] The board of directors may not lend the funds of the corporation to its officers or directors.[78]

The shareholder, as owner of the corporation, has certain rights and privileges provided by statute. When shares of the corporation

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[62]Miss. Code Ann. § 5309-71 (Supp. 1963).
[63]Miss. Code Ann. § 5309-126 (Supp. 1963).
[64]Miss. Code Ann. § 5309-73 (Supp. 1963).
[65]Miss. Code Ann. § 5309-101 (Supp. 1963).
[66]Miss. Code Ann. § 5309-102 (Supp. 1963).
[67]Miss. Code Ann. § 5309-74 (Supp. 1963).
[68]Miss Code Ann. § 5309-75 (Supp. 1963).
[69]Miss. Code Ann. § 5309-53 (Supp. 1963).
[70]Miss. Code Ann. § 5309-281 (Supp. 1963).
[71]Miss. Code Ann. § 5309-282 (Supp. 1963).
[72]Miss. Code Ann. § 5309-78 (Supp. 1963).
[73]Miss. Code Ann. § 5309-76 (Supp. 1963).
[74]Miss. Code Ann. § 5309-77 (Supp. 1963).
[75]See Miss. Code Ann. § 5309-92 (Supp. 1963).
[76]Miss. Code Ann. § 5309-161 (Supp. 1963).
[77]Miss. Code Ann. § 5309-162 (Supp. 1963).
[78]Miss. Code Ann. § 5309-91 (Supp. 1963).

have been fully paid for, the shareholder is entitled to receive a certificate[79] and the liability of the shareholder for the debts of the corporation is limited to the payment of the full purchase price of the shares.[80] Shareholders are entitled to notice of shareholder meetings,[81] and may attend the meetings in person and vote the shares, or have them voted by proxy.[82] A shareholder is entitled to vote the shares held on the date the transfer books are closed.[83] He may vote on all matters properly presented to a shareholder's meeting, may cumulate the shares held for the purpose of electing[84] or removing directors,[85] and may secure a list of the other shareholders entitled to vote at any meeting.[86] A quorum for shareholder meetings is to be a majority of the outstanding shares unless the articles of incorporation provide otherwise, but a quorum shall not consist of less than one-third of the shares entitled to vote at any meeting.[87] Voting trusts may be created,[88] and proxy voting and voting of shares held by others is to be regulated.[89]

Shareholders have the right to inspect the books and records of a corporation,[90] and to dissent from certain actions taken by a corporation;[91] the rights of dissenting shareholders are protected,[92] provided they are timely asserted. Shareholders are entitled to the payment of dividends[93] and to distributions from capital surplus[94] when such dividends and distributions are declared by the board of directors. Payment of cash dividends may be made out of unreserved and unrestricted earned surpluses only.[95]

Corporations as legal entities have certain duties and responsibilities and enjoy such privileges as are granted to them by statute, and may issue such shares of the corporation,[96] common,[97] preferred or special classes,[98] as they are authorized to issue by the articles of incorporation.

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[79]MISS. CODE ANN. § 5309-39 (Supp. 1963).
[80]MISS. CODE ANN. § 5309-51 (Supp. 1963).
[81]MISS. CODE ANN. § 5309-55 (Supp. 1963).
[82]MISS. CODE ANN. § 5309-59 (Supp. 1963).
[83]MISS. CODE ANN. § 5309-56 (Supp. 1963).
[84]MISS. CONST. art. 7, § 194.
[85]MISS. CODE ANN. § 5309-75 (Supp. 1963).
[86]MISS. CODE ANN. § 5309-57 (Supp. 1963).
[87]MISS. CODE ANN. § 5309-58 (Supp. 1963).
[88]MISS. CODE ANN. § 5309-60 (Supp. 1963).
[89]MISS. CODE ANN. § 5309-59 (Supp. 1963).
[90]MISS. CODE ANN. § 5309-111 (Supp. 1963).
[91]MISS. CODE ANN. § 5309-171 (Supp. 1963).
[92]MISS. CODE ANN. § 5309-172 (Supp. 1963).
[93]MISS. CODE ANN. § 5309-81 (Supp. 1963).
[94]MISS. CODE ANN. § 5309-82 (Supp. 1963).
[95]MISS. CODE ANN. § 5309-83 (Supp. 1963).
[96]MISS. CODE ANN. § 5309-39 (Supp. 1963).
[97]MISS. CODE ANN. § 5309-31 (Supp. 1963).
[98]MISS. CODE ANN. § 5309-32 (Supp. 1963).

The shares must be paid for in cash, property or past service.[99] Fractional shares or script may be issued.[100] Provision may be made for stock options consistent with the terms of the Mississippi Securities Act.[101] Funds received for the sale of shares of a corporation shall be the stated capital of the corporation[102] and used for the operation of the corporation. A corporation must maintain a registered office and a registered agent.[103] which may be changed by proper procedure.[104] Process may be served upon corporations by service on the registered agent.[105] A corporation must keep books and records[106] which are open to inspection by shareholders, and which may be inspected by the Secretary of State[107] under certain circumstances. Corporations shall file annual reports with the Secretary of State[108] within the time prescribed by statute on forms to be furnished by the Secretary of State.[109] Corporations, through their officers, directors, agents and shareholders, may exercise all of the powers granted to them by statute.[110] The defense of ultra vires is limited and may be asserted only in certain cases.[111]

Articles of incorporation may be amended[112] by following the procedure prescribed;[113] the amendments shall be effective upon the issuance of a certificate of amendment.[114] Articles of incorporation may be restated,[115] and corporations may be reorganized under proper court procedure.[116] Corporations are restricted in redeeming or reacquiring their shares[117] and such redeemed shares may be cancelled,[118] and the stated capital reduced. Corporations may merge with other domestic,[119] subsidiary[120] or foreign[121] corporations. Corporations may consolidate

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[99]Miss. Code Ann. § 5309-35 (Supp. 1963).
[100]Miss. Code Ann. § 5309-40 (Supp. 1963).
[101]Miss. Code Ann. § 5309-36 (Supp. 1963).
[102]Miss. Code Ann. § 5309-37 (Supp. 1963).
[103]Miss. Code Ann. § 5309-21 (Supp. 1963).
[104]Miss. Code Ann. § 5309-22 (Supp. 1963).
[105]Miss. Code Ann. § 5309-23 (Supp. 1963).
[106]Miss. Code Ann. § 5309-111 (Supp. 1963).
[107]Miss. Code Ann. § 5309-284 (Supp. 1963).
[108]Miss. Code Ann. § 5309-251 (Supp. 1963).
[109]Miss. Code Ann. § 5309-287 (Supp. 1963).
[110]Miss. Code Ann. § 5309-04 (Supp. 1963).
[111]Miss. Code Ann. § 5309-06 (Supp. 1963).
[112]Miss. Code Ann. § 5309-131 (Supp. 1963).
[113]Miss. Code Ann. § 5309-132 (Supp. 1963).
[114]Miss. Code Ann. § 5309-136 (Supp. 1963).
[115]Miss. Code Ann. § 5309-137 (Supp. 1963).
[116]Miss. Code Ann. § 5309-138 (Supp. 1963).
[117]Miss. Code Ann. § 5309-141 (Supp. 1963).
[118]Miss. Code Ann. § 5309-142 (Supp. 1963).
[119]Miss. Code Ann. § 5309-151 (Supp. 1963).
[120]Miss. Code Ann. § 5309-155 (Supp. 1963).
[121]Miss. Code Ann. § 5309-157 (Supp. 1963).

with other domestic corporations.[122] Corporations are subject to certain penalties[123] for failure to comply with the terms of the statute.

IV. Dissolution

Corporations may be dissolved voluntarily by the incorporators.[124] Dissolution of corporations that are engaged in business may be accomplished by consent of the shareholders[125] or by act of the corporation.[126] A statement of intent to dissolve[127] by the shareholders or the corporation may be filed with the Secretary of State. When such is done, the the corporation shall cease to carry on its business except for the purpose of winding up its affairs;[128] the corporation shall proceed to collect, liquidate and dispose of its assets.[129]

Dissolution by act of the shareholders or by act of the corporation may be revoked,[130] in which case a statement of revocation of voluntary dissolution proceedings shall be filed with the Secretary of State;[131] the corporation may then resume its business. If the voluntary dissolution proceedings have not been revoked and all debts have been paid, articles of dissolution shall be prepared[132] and filed is duplicate originals,[133] and a certificate of dissolution shall be issued by the Secretary of State. A corporation may be dissolved involuntarily by a decree of the chancery court on petition of creditors or shareholders under certain circumstances,[134] or on petition of the Attorney General for failure to perform certain of its statutory duties.[135] The chancery court of the district where the registered office of the corporation is situated shall have venue[136] and jurisdiction to liquidate the assets and business of such corporation.[137] In involuntary liquidation proceedings, the court may appoint receivers[138] whose qualifications are established[139] and the

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122Miss. Code Ann. § 5309-152 (Supp. 1963).
123Miss. Code Ann. § 5309-272 (Supp. 1963).
124Miss. Code Ann. § 5309-181 (Supp. 1963).
125Miss. Code Ann. § 5309-182 (Supp. 1963).
126Miss. Code Ann. § 5309-183 (Supp. 1963).
127Miss. Code Ann. § 5309-184 (Supp. 1963).
128Miss. Code Ann. § 5309-185 (Supp. 1963).
129Miss. Code Ann. § 5309-186 (Supp. 1963).
130Miss. Code Ann. §§ 5309-187 to 188 (Supp. 1963).
131Miss. Code Ann. § 5309-189 (Supp. 1963).
132Miss. Code Ann. § 5309-191 (Supp. 1963).
133Miss. Code Ann. § 5309-192 (Supp. 1963).
134Miss. Code Ann. § 5309-201 (Supp. 1963).
135Miss. Code Ann. § 5309-202 (Supp. 1963).
136Miss. Code Ann. § 5309-203 (Supp. 1963).
137Miss. Code Ann. § 5309-204 (Supp. 1963).
138Miss. Code Ann. § 5309-205 (Supp. 1963).
139Miss. Code Ann. § 5309-206 (Supp. 1963).

court may permit the filing of claims[140] or discontinue the liquidation proceedings.[141] If the liquidation proceedings are completed, the court shall enter its decree dissolving the corporation,[142] and a copy thereof shall be filed with the Secretary of State;[143] any assets not distributed shall be paid into the state treasury.[144]

V. Conclusion

The legislature has enacted for the people of Mississippi generally, but for the members of the Bar and the business world in particular, a complete, comprehensive and workable business corporation law. Many of the voids in the earlier law have been filled. Where there was no clear way to go, in the future the way to proceed will be clearly marked and established. The provisions of the new act will apply equally as well with small, closed or family type corporations as they will with the large publicly held corporations. It is submitted that the Bar will long applaud the work of its various committees and the individual members thereof who worked so long and hard preparing the draft of this act and securing its unanimous approval by both houses of the legislature.

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[140]Miss. Code Ann. § 5309-207 (Supp. 1963).
[141]Miss. Code Ann. § 5309-208 (Supp. 1963).
[142]Miss. Code Ann. § 5309-209 (Supp. 1963).
[143]Miss. Code Ann. § 5309-210 (Supp. 1963).
[144]Miss. Code Ann. § 5309-211 (Supp. 1963).

State Bar Section

PROGNOSIS OF THE UNIFORM COMMERCIAL CODE*

I. Past

In 1896 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Negotiable Instruments Law. Mississippi was the last state in the union to adopt this act which had achieved uniformity in every other jurisdiction. As the twentieth century approached our economy was for the most part agrarian, and there was some argument that we did not need the NIL. The Uniform Warehouse Receipt Act was passed and the NIL was needed also. Certainly now when Mississippi has made such progress in balancing agriculture with industry, we do not want the dubious distinction of being the last state to adopt the Uniform Commercial Code.

During 1939 the New York Merchants Association prepared and had introduced into Congress an ill-advised sales act to govern all interstate transactions. Realizing that without each state's coordinated effort such an act was doomed to certain calamity, the Conference on Uniform State Legislature determined a commercial code was needed which would include a sales act. Mississippi has never adopted the Uniform Sales Act and, as is the case in other states, this tends for lawsuits resulting from misunderstandings. The New York Merchants Association agreed to withdraw the proposed sales act. The Falk Foundation donated $275,000 to the commissioners and over $100,000 was received from other sources for this project. The American Law Institute was invited and accepted the invitation to cosponser this gigantic undertaking. During the twelve-year period, beginning 1940, the great effort, persistance and hard work these two distinguished organizations devoted to the Code was indeed fantastic. In 1952 the American Bar unanimously endorsed the Uniform Commercial Code. This is a great tribute to the literary accuracy and quality of this proposed legislation.

Every phase of commercial transactions is included in the Code in such language that an average layman will understand the rules governing any transaction. The Code embodies Bank Deposits and Collections (NIL), Sales Act, Commercial Paper, Letters of Credit, Bulk Transfers, Secured Transactions, Investment Securities, Motor Vehicle Liens, Investment Securities, and Financing Accounts Receivable and Warehouse Receipts which differs only slightly from the Uniform Warehouse Receipt Act we have had in Mississippi for many years.

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*By Gibson B. Witherspoon; Chairman of Committee of State Legislation of A.B.A. for 1963, Committee of Uniform Commercial Code of Corporate, Banking and Business Law Section of A.B.A., Commissioner for Mississippi for National Conference on Uniform State Laws and member of House of Delegates of A.B.A.

Pennsylvania was the first state to adopt the Code, doing so in 1953. However, New York, in the same year, began an elaborate study of the Code. For three years, twenty experts from every commercial field conducted public hearings with practical executives from banks, transportation, insurance companies, warehouse associates, credit associations, financial institutions, and every industrial and commercial interest. The cost of this study was over $332,000, and the reports cover 2,000 pages of solid material, expertly prepared from first-hand knowledge gleaned from America's greatest financial center. So practical were their recommendations that over eighty-eight per cent of all suggestions were accepted and incorporated in the official 1957 text of the Code. So after continuous efforts for seventeen years, and at a cost of well over a million dollars (exclusive of all the time contributed gratuitously by the commissioners, ALI, law schools and representatives of commerce) the states were presented with a peerless, perfected product.

II. Present

After a decade of practicing under the Code, William A. Schnader, former Attorney General of Pennsylvania and now Chairman of the Code Committee, made this observation:

> Lending procedure has been greatly simplified, with the result that many loans can now be made which were impossible under prior uniform acts. Practically no litigation has resulted from the enactment of the Code. It is especially helpful to the little businessman as it enables him to obtain credit to a degree previously impossible.

It is evident, and statistics prove, that many bankruptcies would have been averted in the past four years if accounts receivable could have been assigned to some factor, and the ready cash made available to tide businessmen over for our brighter future.

The fact that many states have found it necessary to enact amendments has been the principal objection to the NIL. The states did not make these amendments uniform. Therefore, the original concept of uniformity is not a reality. This is now especially true since eighteen states have enacted the Code, and these states have business dealings with states where the NIL is operating with obsolete amendments. Forseeing this experience with the NIL, the Falk Foundation has evidenced its continued interest in the Code by providing a substantial endowment fund. The income from this fund makes possible a Permanent Editorial Board, whose responsibility will be to review the Code every two years with the decisions and draft amendments to keep it abreast with our changing times.

This committee will act in cooperation with the American Law

Institute and the National Conference of Commissioners of Uniform State Laws. A part of the agreement is:

> It shall be the policy of the Board to assist in attaining and maintaining uniformity in state statutes governing commercial transactions and to this end to approve a minimum number of amendments to the Code.
>
> Amendments shall be approved and promulgated when:
>
> (a) It has been shown by experience under the Code that a particular provision is unworkable or for any other reason obviously required amendment; or
>
> (b) Court decisions have rendered the correct interpretation of a provision of the Code doubtful and an amendment can clear up the doubt; or
>
> (c) New commercial practices shall have rendered any provisions of the Code obsolete or have rendered new provisions desirable.

You might ask the question, "Why change to the Commercial Code in Mississippi? Let's keep the NIL." In 1949 twelve initial reasons were advanced[1] and they are fundamentally sound today:

> 1. The original act was not passed in all the states in precisely identical form.
>
> 2. Various states have found amendments necessary in an effort to streamline the original acts.
>
> 3. After a lapse of fifty years [now over sixty years], it is conceded that some of the original provisions do not fit present day methods of doing business.
>
> 4. Strange as it may seem, even identical phrases of the Act have been construed differently by respected tribunals in a neighboring or sister state. There are over seventy examples of different judicial holdings, contrary conclusions, on the very same Sections of the NIL.
>
> 5. There is a definite need and a growing demand for a streamlined Code. The drafters have this purpose in mind and have consulted and counciled with bankers and businessmen in every section of America and it is believed the New Code will be both simple and practical.
>
> 6. Organizations have undertaken to amend and change the original NIL and if a modernized Code is not compiled at an early date, the amendments may be more uniform than the original act, which would further tend to confusion in transactions.
>
> 7. It is conceived that the New Commercial Code will not only embrace commercial paper but also Sales Act, Letters of Credit, Foreign Banking, Financing of Accounts Receivable, Agriculture and Consumer's Goods, Motor Vehicle Liens and many new subjects. It is admitted by everyone that uniformity is desirable in more fields and the New Code will cover these virgin fields of commerce. A comprehensive transfer act for

[1]Witherspoon, *Why a New Commercial Code?*, 54 COM. L.J. 291 (1949).

motor vehicles is prescribed which, if made uniform in the several states, would be a very great stride forward.

8. Some of the truly great legal minds of our country have drafted the Code and such persistent continuous study, screening by the Conference and the American Law Institute, and the concerted efforts of so many brilliant barristers would never be available to any one state legislature.

9. The New Code eliminates most, if not all, of the many admitted defects in the present NIL.

10. Businessmen can adjust their dealing to fit the applicable rules of law if they know in advance with reasonable certainty what the rules are. The New Code not only gives us a simple concise rule but it also gives us reasons and explanations for such rules in the full and complete notes found under each section.

11. Certainly in the commercial field, the uncertainties of the common law may do the most harm while a modern statutory codification the most good.

12. It is obvious that commerce is not organized on state lines. The perplexing differences in the laws of the several states only serve as a burden upon legitimate enterprise.

Now another reason has been advanced:

> With the ever expanding interests of the 50 states, the District of Columbia and Puerto Rico, non-uniformity of commercial law is a costly handicap to the expeditious movement of money and goods in both domestic and international commerce. It seems unthinkable that enlightened bankers, businessmen and lawyers should hold back the passage of the Commercial Code in any state.[2]

The Mississippi State Bar has appointed study committees, who have considered each of the nine chapters covering every possible transaction in commercial transactions. On two occasions the Mississippi State Bar heard the reports of their study committees and unanimously endorsed the Code for passage in Mississippi.

In 1959 the Mississippi Economic Council appointed a committee to study the Code. They reported favorably for the Code enactment, and the Mississippi Chamber of Commerce went on record as approving the Code. At the 1960 Regular Session, Senators Marion Smith and the late W. B. Alexander introduced Senate Concurrent Resolution 133, providing for four members of the house and senate as a recess Special Study Committee to report to the 1962 session. The resolution died in the house because they felt they should have more members on the committee. The Code was introduced at the 1962 legislature but did not pass the senate. The chairman of one of the judiciary committees stated that he had had no time to study the Code and, therefore, to

[2]Schnader, *Uniform Commercial Law—How Soon?*, 13 PERSONAL FINANCE L.Q. REPORT 68 (1959).

wait until 1964. It is hoped that on the third attempt the Code will pass both the house and the senate without opposition at the next regular session. Being a uniform act no amendments should be made because if they are the uniform feature for all jurisdictions would be defeated. The Conference of Commissioners on Uniform States Laws make two recommendations:

> 1. Have the Code bill ready for introduction on the first day when bills can be introduced and make every effort to have the legislative process speeded up so that the Code will not come before either house for consideration in the closing days of the legislative session.
> 2. In each state one lawyer in the House and one in the Senate (usually these lawyers are interested in either banking or some other phase of commercial law) must take personal responsibility for pushing the passage of the Code from the day it is introduced until it is finally enacted.

III. Prognosis

Eighteen states have already enacted the Code,[3] and it is believed that a large number will soon join the parade. By the end of the legislative session of 1963 fifty to sixty-six per cent of the states will have adopted the Uniform Commercial Code.

Recent developments in several states indicate prompt action. The legislature of South Carolina passed a joint resolution creating a nine-member committee—three from each house and three from the Judicial Council—to study the Uniform Commercial Code and support the general assembly. The committee's work has been implemented by the employment of Professor Foster from the Law School of the University of South Carolina as reporter, with James F. Dreher to assist him. A $5,000 appropriation was made and the reporters are taking the Code, section by section, and analyzing it with the present law of the state. It will probably be 1964 before their report is complete and the legislature passes the Code in South Carolina. Merton G. Henry of Portland reports that the Maine State Bar Association Committee has endorsed the Code.

The Judicial Committee held a hearing February 14, and indications are that Maine will pass the Code at the present session. The Nebraska State Bar Association has approved the Uniform Commercial Code, and it will be introduced when the legislature meets in January 1963. There is no organized opposition to the Code and it is believed

[3]Pennsylvania (1953), Massachusetts (1957), Kentucky (1958), Connecticut (1959), New Hampshire (1959), Rhode Island (1960), Wyoming (1961), Arkansas (1961), New Mexico (1961), Ohio (1961), Oregon (1961), Oklahoma (1961), Illinois (1961), New Jersey (1961), Georgia (1962), Alaska (1962), New York (1962), Michigan (1962).

that Nebraska will adopt the Code this session. In Arizona, nine special Code committees from the State Bar Association and the Bankers Association are busily studying the Code, but when the Code will be introduced to the legislature has not been determined. The State Bankers of Virginia are studying the Code, and it is probable they will not have their report ready for the annual convention or have recommendations for the 1963 session of the legislature.

West Virginia's Interim Committee on Government and Finance, on July 11 of this year, voted $10,000 to finance a study with complete annotations of the West Virginia laws and have the Code ready for 1962. The Governor may designate the Code for specific consideration in addition to the budget, which will be considered. Professor William R. Lorenson of the West Virginia Law School has undertaken the preparation of annotations and will report this fall to the Interim Committee. The chances are good for enactment either at the budget session in 1962 or certainly at the regular session in 1963.

The prospect of enactment of the Code in 1963 is favorable in several states. In California the Advisory Committee submits their report to the legislature. The State Bar of Florida has completed its annotations of the Code. The General Assembly of Indiana will probably act in the current year due to the fact that it is almost completely surrounded by Code states. The State Bar Committee of Iowa is studying the Code and they also may be surrounded by Code states in 1963. In Maryland the Governor appointed a committee of twenty-one attorneys and bankers to study the Code under the direction of J. Francis Ireton of Baltimore. Professor Robert C. McClure of the Minnesota School of Law is preparing annotations for that state. Paul Carrington, Esq., immediate past president of the Texas State Bar Association, announces that the Texas Bar will sponsor the Code for a 1963 adoption. The Utah State Bar is studying the Code until the next legislative session. In Vermont the Appropriation Committee of the house introduced the Code so that it may be studied and pushed in the 1963 session.

The Legislature of Tennessee has now passed the Code effective June 30, 1964, so now both Arkansas and Tennessee have the Code. Also, both houses of the legislature in Indiana, West Virginia, Montana, and Maryland have passed the Code and the Governors are expected to sign the bills to make a total of twenty-three states which will have adopted the Code. As this edition goes to press in the middle of March, we find that the Code is being considered by the legislatures in California, Hawaii, Maine, Minnesota, Missouri, Nebraska, Texas, Vermont, Washington and Wisconsin. If three of these states adopt the Code, then there will be a total of twenty-six, or over half of the states, operating under the Uniform Commercial Code. Informants state that five to six of these states and possibly all of them will adopt the Code. Ten addi-

tional states will probably enact the Code by the end of 1964, and it is hoped by 1965 all fifty states will have enacted the Code so that we will have complete uniformity in all commercial transactions. Perhaps a later date is more realistic for total uniformity in the commercial field. We envision the enactment of the Uniform Commercial Code in all jurisdictions not later than 1967.

The Code is composed of short, concise sections, couched in language as simple as legal accuracy will permit, taking into account actual real life customs and needs. It is really a good Code, well arranged, adequately indexed and executed with a high degree of literary merit. Certainly the Code is worthy of the support of lawyers and laymen in every jurisdiction in which it has not been enacted into law.

THE MISSISSIPPI BAR FOUNDATION: A CHALLENGE AND OPPORTUNITY*

I. Introduction

The recently created Mississippi Bar Foundation was organized for the following reasons. There should be a more intensive, coordinated study of the many complex, contemporaneous legal problems in Mississippi jurisprudence. In this era of extreme complexity in the law, individual efforts alone are not enough to insure the desired progress. In order to improve and facilitate the administration of justice, an organization representative of the bench and bar of this state should direct its research skills and efforts toward supplying essential background information and ideas for the solution of current legal issues, which the organized bar seeks to solve in the public interest. Moreover, the practice of law requires continuing legal education, which encompasses not only an appreciation of its past and present, but also of its future.

Shortly after the beginning of his term as President of the Mississippi State Bar, C. Sidney Carlton, recognizing these needs, appointed a six man Committee on a Mississippi Bar Foundation, under the chairmanship of N. W. Overstreet, Jr. This committee obtained a large amount of information from twelve other legal foundations over the country, organized by state bars. It examined their experiences and operations, considered the asserted needs and various problems connected with such an organization, and studied carefully the overall issues. It recommended unanimously to the Commissioners of the Mississippi State Bar that a non-profit Mississippi corporation be established with the general objectives and purposes stated above. It also suggested a form of charter and method of organization.

These recommendations were approved by the Board of Commissioners of the Mississippi State Bar at its meeting on December 6, 1962. Those present at that meeting were the incorporators. On December 11 the official charter of incorporation of the Mississippi Bar Foundation, Inc. was issued by the State of Mississippi. On January 25, 1963 the incorporators of the Foundation met, adopted the charter, enacted bylaws for its management and control, and elected a Board of Trustees, consisting of five members.

Article III of the bylaws provides that the business and affairs of the Foundation shall be managed by a Board of Trustees, elected by the membership at the organizational meeting of the Foundation. The trustees are: J. K. Dossett, for the first Supreme Court District; W. S. Henley, for the second district; Hugh N. Clayton, for the third district;

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*By W. N. Ethridge, Jr.; Associate Justice, Supreme Court of Mississippi.

and C. Sidney Carlton and W. N. Ethridge, Jr., from the state at large. The trustees need not be members of the corporation, provided they are members in good standing of the Mississippi State Bar. Their successors will be elected at the annual meeting of the members of the Foundation, which is the organizational meeting of the board of commissioners of the bar.

II. Purposes of the Foundation

The charter provides that the Foundation shall have these purposes:

> To promote and carry on the following educational, literary, scientific, and charitable purposes, or any of them, both directly and by the application of funds to the use of the Mississippi State Bar, if for charitable, scientific, literary, or educational purposes, or to the use of any other corporation, trust, fund, foundation, or other organization whose purposes and operations are exclusively charitable, scientific, literary, or educational:
>
> A. To improve and to facilitate the administration of justice;
> B. To promote the study of law and research therein, the diffusion of knowledge thereof, and the continuing education of lawyers;
> C. To cause to be published and to distribute addresses, reports, treatises and other literary works on legal subjects;
> D. To establish and maintain a law library and seminars, lectures, and studies devoted to the law;
> E. To establish, maintain and award scholarship and fellowship funds and loans, and to create and maintain a professorship at an accredited law school;
> F. To acquire, preserve and exhibit rare books and documents, objects of art, and items of historical interest having legal significance or bearing on the administration of justice.

The Foundation's powers include those quoted, and others, such as to take by bequest, devise, gift, and otherwise, and to hold real and personal property; to convey such property, and to invest, reinvest and deal with the same in such manner as in the judgment of the trustees will best promote the Foundation's purposes; and to exercise all other powers and rights as are reasonably necessary to accomplish its stated objectives.

The charter provides that no part of the net earnings of the corporation shall inure to the benefit of any member or any individual, and further that no substantial part of the activities of the corporation shall consist of the carrying on of propaganda, or otherwise attempting to influence legislation. Its operations are non-profit.

The bylaws (Article IV) direct the board of trustees to elect a

president, vice president, and secretary-treasurer of the Foundation. The board of trustees met on February 13, 1963, in its organizational meeting, and elected W. S. Henley as president of the Foundation. N. W. Overstreet, Jr. was chosen vice president, and Mrs. Alice Nevels, secretary-treasurer. The trustees were of the opinion that their initial purpose should be to acquaint fully the members of the bar of this state with the organization, purposes, and unlimited potentialities of the Mississippi Bar Foundation. Hence this brief review of its history to date and its objectives.

III. The Fellows

The charter gives the board of trustees power to create classes of membership in the Foundation, in addition to the initial one of all members of the State Bar's Board of Commissioners. At its first meeting, the trustees created a group of members, to be known as The Fellows of the Mississippi Bar Foundation. They will have voting rights and will be elected by the Board of Trustees of the Foundation, after receipt of written applications for membership. Applicants must be members of the Mississippi State Bar in good standing. Membership dues for Fellows take the form of $50 annual contributions for a five-year period. Thereafter The Fellow becomes a Life Member with no additional financial obligations.

The Fellows of the Mississippi Bar Foundation will be a valuable asset in helping to fulfill objectives of the Foundation. Membership in The Fellows is deemed a professional honor. They will be lawyers who are devoted to the highest principles of conduct in their public and private careers, to their profession, and to participation in activities of the bar and improvements in the administration of justice.

Even more important than financial support will be the availability, to the research and service program, of The Fellows and their experience as administrators of the law—practitioners, judges, and law teachers. The Foundation should receive many suggestions for meaningful projects from The Fellows. In this way, the proposed research and service programs of the Foundation may be effectively coordinated with problems of current, practical importance facing the profession.

In short, The Fellows will constitute a fraternal group of distinguished members of the profession, who have as a common bond their desire to fulfil their responsibilities to the law and to the profession by participating in and supporting the activities of the Foundation.

IV. An Opportunity for Service

Theodore Roosevelt once said, "Every man owes some of his time

to the upbuilding of the profession to which he belongs." The Mississippi Bar Foundation presents a challenge and an opportunity to the bar of Mississippi. It will be a unique and independent institution, established by the leaders of the Mississippi bar to serve both the public and the legal profession.

Essentially, the Foundation is a non-profit research organization, devoted to improvement of the law and the administration of justice in its many related aspects in this state. As Whitney North Seymour said about the American Bar Foundation, "It will help close the gap by increasing our professional reach, without surrendering the values which have brought us the long distance we have already come."

For the many lawyers in Mississippi who are devoted to the profession, and who have the desire to improve the law and the administration of justice, participation in the work of the Foundation offers a challenge and an opportunity.

Forms of application for membership in The Fellows of the Foundation may be obtained by writing the Board of Trustees, Mississippi Bar Foundation, Inc., P. O. Box 1032, Jackson 5, Mississippi.

We all have a common desire to meet fully our responsibilities to the law and the profession. This can be advanced by participating in and supporting the activities of the Mississippi Bar Foundation.

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Student Comments

COUNSEL IN CRIMINAL CASES IN MISSISSIPPI

I. Right to Counsel

In the light of the recent decision of *Gideon v. Wainwright*,[1] providing that counsel must be afforded by the state in all criminal cases, both capital and noncapital, an analytical survey of the status of counsel in criminal cases becomes timely and significant. We have now come a long way on the road of legal enlightenment and protection of individual freedom from the early days of the common law. Originally in England, a prisoner charged with treason or felony was not permitted to be heard by counsel.[2] Judges, however, did allow counsel to advise a defendant on the conduct of his case and represent him in collateral matters and on questions of law arising during the trial.[3] It was not until 1695 that the rule as to treason was abolished by statute, and it was not until 1836 that the rule forbidding participation by counsel as to indictments for felony was abrogated by act of Parliament.[4]

It appears that in at least twelve of the thirteen American colonies the right to counsel was fully recognized in criminal prosecutions, although in one or two instances the right was restricted to capital crimes or the more serious offenses.[5] Thus, the rule of the common law was definitely rejected. In the original states whenever provision was made for appointment of counsel it was done by statute rather than by constitutional provision. Provisions in the early constitutions regarding right to counsel in criminal cases show great diversity. The first Congress in April 1790, in a statute entitled, "An Act for Punishment of Certain Crimes Against the United States," provided that in cases of treason and in other capital crimes,

> . . . every person so accused and indicted for any of the crimes aforesaid, shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall and they are hereby authorized and required immediately upon his request to assign to such persons such counsel, not

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[1]Gideon v. Wainwright, 83 Sup. Ct. 792 (1963).

[2]See Powell v. Alabama, 287 U.S. 45 (1932); Betts v. Brady, 316 U.S. 455 (1942).

[3]*Ibid.*

[4]See Powell v. Alabama, 287 U.S. 45 (1932); Betts v. Brady, 316 U.S. 455 (1942). Two recent writers assert that history does not support the Supreme Court's conclusion that appointment of counsel was not a fundamental right at English common law. Becker and Heidelbaugh, *Right to Counsel in Criminal Cases: An Inquiry into the History and Practice in England and America*, 28 Notre Dame Law. 351 (1953).

[5]See Betts v. Brady, 316 U.S. 455 (1942).

> exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours. . . .[6]

From 1790 until 1938, a span of almost a century and a half, perhaps because the act of Congress dealt only with treason and capital crimes, it was believed that the assignment of counsel for defense was limited to only such cases. For other criminal offenses only the right of representation by accused's own counsel existed in the federal courts, and there is little in the opinions to suggest a requirement of appointment of counsel for indigent or ignorant defendants except in capital cases.[7] Today practically every state in the Union has a specific guarantee in its constitution that the accused in criminal proceedings has the right to the assistance of counsel. In some states the right is constitutionally guaranteed only in capital cases.[8] Section 26 of the constitution of Mississippi reads:

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself. . . .[9]

II. Rights Under the Federal Constitution and Relation to the States

The right to counsel in the federal courts is guaranteed in all criminal prosecutions by the explicit language of the sixth amendment: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."[10] In 1938 the case of *Johnson v. Zerbst* introduced a new development in criminal and constitutional law by radically changing the interpretation of the guaranty of right to counsel under the sixth amendment.[11] In this case the Supreme Court held that a person charged with crime in a federal court is "entitled" to the assistance of counsel. The Court saw the purpose of the constitutional guaranty as a protection for the accused from conviction resulting from his ignorance of his legal rights.

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[6] 1 Stat. 118 (1790).

[7] See Cross, *"The Assistance of Counsel for His Defense": Is This Becoming a Meaningless Guarantee?* 38 A.B.A.J. 995 (1952).

[8] See generally Fellman, *The Right to Counsel Under State Law*, 1955 Wis. L. Rev. 281.

[9] Miss. Const. art. 3, § 26.

[10] See generally Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U.L. Rev. 1 (1944).

[11] 304 U.S. 458 (1938).

Compliance with the mandate is an essential jurisdictional prerequisite to the federal courts' authority to deprive a person of life or liberty. The resulting practice, arising out of this case, has been embodied in the Federal Rules of Criminal Procedure. Rule 44, effective March 26, 1946, provides: "If the defendant appears in court without counsel the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."[12]

The fourteenth amendment prior to the *Gideon* decision was not considered to apply the specific guarantees of the sixth amendment in criminal proceedings of the states,[13] but it was held that the amendment did impose on state actions the constitutional restriction that they ". . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."[14] In 1932 the United States Supreme Court held that the due process clause of the fourteenth amendment guarantees the right of assistance of counsel to a person charged with a capital offense in a state court. If the defendant is unable to employ counsel or is unable to conduct his own defense adequately, it is the duty of the state court, in a capital case, to assign counsel for him.[15] Later, in *Betts v. Brady*, a noncapital case, a divided court denied the demand that in every criminal case, whatever the circumstances, a state must furnish counsel.[16] The Court stated that the sixth amendment applies only to trials in federal courts and that the due process clause of the fourteenth amendment does not incorporate the guarantees of the sixth amendment. Since in the great majority of states it is the considered judgment of the people that appointment of counsel is not a fundamental right, the court felt that it was not for it to say that the states are obligated to afford counsel in every case. The application of the due process clause to state criminal proceedings is not governed by hard and fast rules. "Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may constitute a denial of fundamental fairness, shocking to the universal sense of justice may, in other circumstances, and in the light of other considerations, fall short of such denial."[17] Thus, a lack of provision for counsel in state trials might in certain circumstances be held to deprive the accused of due process

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[12]Fed. R. Crim. P. 44. However, there is no provision by rule or statute for compensation for services of the lawyer or reimbursement for his expenses.

[13]Palko v. Connecticut, 302 U.S. 319 (1937).

[14]Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

[15]Powell v. Alabama, 287 U.S. 45 (1932).

[16]316 U.S. 455 (1942).

[17]*Id.* at 462.

of law. The *Betts* rule meant that we had to determine whether a defendant was entitled to counsel, case by case.[18]

The *Betts* decision was affirmed by *Foster v. Illinois* in which the Court said, "Our duty does not go beyond safeguarding rights essential to a fair hearing by the states."[19] In *Bute v. Illinois,* the Supreme Court held that in the circumstances of that particular noncapital case, the state tribunal was not required to inquire into defendant's desire to be represented by counsel or his ability to employ counsel, nor was it required to assign counsel for his defense.[20] In succeeding cases the Court held that the due process clause of the fourteenth amendment requires states to furnish counsel in noncapital cases only when there are "special circumstances" showing that without legal representation the defendant could not have an adequate and fair defense.[21]

The "special circumstances" requirement of the *Betts* decision has been applied in a number of cases in which the Supreme Court held that the lack of counsel in noncapital trials in state courts resulted in injustice and violated the due process clause of the federal constitution. The Court reversed the decisions of state tribunals when defendant had no reasonable opportunity to consult with attorneys,[22] where an inexperienced youth was before the court,[23] when the accused was unfamiliar with court procedure,[24] where the prosecution submitted misinformation,[25] where there were trial mistakes in procedure,[26] and when defendant was illiterate.[27]

On March 18, 1963, the Supreme Court of the United States handed down its decision in *Gideon v. Wainwright*[28] reversing *Betts v. Brady*. The *Gideon* case involved a noncapital offense in Florida where the indigent defendant requested the court for the assistance of counsel. His request was denied, for counsel could be assigned only in capital crimes according to the law of the state. The defendant conducted his own defense, and, after conviction, filed a habeas corpus petition in the state supreme court. He was denied relief. The United States

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[18]For a critical appraisal of the *Betts* rule see 47 MICH. L. REV. 705 (1949); 10 U. PITT. L. REV. 232 (1948); 26 TEMPLE L.Q. 86 (1952).

[19]332 U.S. 134, 139 (1947).

[20]333 U.S. 640 (1948).

[21]*E.g.*, Palmer v. Ashe, 342 U.S. 134 (1951); Gallegos v. Nebraska, 342 U.S. 55 (1951).

[22]House v. Mayo, 324 U.S. 42 (1945).

[23]Uveges v. Pennsylvania, 335 U.S. 437 (1948).

[24]Wade v. Mayo, 334 U.S. 672 (1948).

[25]Townsend v. Burke, 334 U.S. 736 (1948).

[26]Gibbs v. Burke, 337 U.S. 773 (1949).

[27]Carnley v. Cochran, 369 U.S. 506 (1961).

[28]83 Sup. Ct. 792 (1963).

Supreme Court granted certiorari. The issue before the Court was the reconsideration of the *Betts v. Brady* holding.[29]

The Court found in the *Gideon* case facts and circumstances almost indistinguishable from those present in the *Betts* case.[30] The Court recalled that in the latter case it was concluded that appointment of counsel is not a fundamental right essential to a fair trial, and that the sixth amendment was not made effective against the states by the fourteenth amendment. The Court pronounced: "We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment."[31] In many cases, the ". . . Court has looked to the fundamental nature of [the] original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States."[32] Recognized as of this nature and therefore obligatory on the states by the fourteenth amendment are the first amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances, the fifth amendment's command that private property shall not be taken for public use without just compensation, the fourth amendment's prohibition of unreasonable searches and seizures, and the eighth amendment's prohibition on cruel and unusual punishment.[33]

The Court said:

> We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of the fundamental rights. . . . The fact is that in deciding as it did—that 'appointment of counsel is not a fundamental right, essential to a fair trial'—the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.[34]

Thus, today, the right to counsel in all criminal cases as embodied in the sixth amendment is extended to the states through the fourteenth.

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[29] *Id.* at 793.
[30] *Ibid.*
[31] *Id.* at 794.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

III. Assignment of Counsel in Mississippi

There is a marked distinction between the right of the accused to be heard by counsel of his own choice, guaranteed by the Mississippi constitution, and recognized by all states, and the right of the defendant to have counsel assigned for his defense. As to assignment of counsel, it is well recognized in Mississippi that this is a definite requirement in capital cases. The Mississippi Code provides:

> Where any person is in jail charged with a capital crime, or is indicted for such crime, and the court being first satisfied that such person is unable to employ counsel, such person shall be allowed counsel not exceeding two, to be chosen for him by the judge in vacation or by the court, to defend him in the circuit court, upon the trial of such charge, and such counsel selected and appointed by the judge or court shall have free access to the prisoner, who shall have process to compel the attendance of witnesses in his favor, and the defendant shall be entitled to advice of such counsel before he is required to plead to the indictment.[35]

Provision is made for fees of counsel.[36] The requirement of appointment of counsel where the defendant in capital cases is unable to employ legal aid has been recognized by numerous court decisions.[37] The statute is mandatory and it "was not intended to be a mere formality."[38] Mississippi has for over a century provided that the state will not demand the life of the accused without the benefit of counsel, for the statute first appeared in the Code of 1848.[39]

Section 2505 of the Code, provides not only for the appointment of an attorney for a defendant charged with a capital crime when he is unable to employ counsel, but states that the defendant shall be entitled to such advice before pleading to the indictment. In a case before the court where the trial judge had made the appointment of counsel one day after the arraignment, the supreme court held this to to be error, but harmless. After the appointment of counsel, the defendant was permitted to move to quash the indictment, and challenge the competency of a grand juror. No request was made for further action. The record showed that the defendant had a fair and impartial jury and trial.[40] Said the court: "The statute is mandatory and

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[35]Miss. Code Ann. § 2505 (1956).

[36]Miss. Code Ann. § 2505 (1956).

[37]*E.g.*, Robinson v. State, 178 Miss. 568, 173 So. 451 (1937). In Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937), the status of an appointed counsel was defined as one of agent for the defendant within the scope of his duties, whether the defendant be sane or insane.

[38]McKenzie v. State, 233 Miss. 216, 219, 101 So. 2d 651, 653 (1958).

[39]See *Id.* at 219, 101 So. 2d at 653.

[40]Robinson v. State, 178 Miss. 568, 173 So. 451 (1937).

should be observed by the court in capital cases; and, if we could find in this record a single right denied to the appellant, we would unhesitatingly reverse this case for the violation of the statute. . . . Another arraignment, after appointment of counsel, appears in this case to be an idle ceremony."[41] In another instance, the supreme court held that the lower court erred in arraigning the appellant before appointment of counsel, but the court stated that error in a judgment does not require reversal unless the accused is prejudiced thereby.[42] In a similar case, the Mississippi court stated, "We recognize that there are some recent decisions of the U.S. Supreme Court to the effect that a plea of guilty in the state courts to a felony is invalid if entered at a time when the accused is not represented by counsel."[43] In this case the defendant pleaded not guilty and was ably represented by two attorneys throughout his trial. He did not request the court to delay the arraignment, and neither did he state that he was unable to employ counsel nor request the court to appoint one for him. Under the circumstances of the case, the supreme court held that "he was not prejudiced by the fact that he did not have an attorney present when he pled not guilty. . . ."[44]

While the requirement of the assignment of counsel to a defendant in a capital case who cannot employ counsel is mandatory, there has been, however, an absence of required assignment of counsel in noncapital cases in Mississippi. In numerous decisions the Supreme Court of Mississippi has held that the sixth amendment to the federal constitution providing that the accused shall have the right to assistance of counsel in criminal prosecution does not apply to trials in state courts.[45] The sixth amendment ". . . is not a limitation of the powers of the state, and it is confined alone to federal action."[46] While section 26 of the constitution guarantees to a prisoner the right to be heard by himself or counsel, or both, it does not require the court to appoint counsel. In *Odom v. State*, the Mississippi Supreme Court disposed of the question by asserting unequivocally that only persons charged with capital crimes and unable to employ counsel may have the court appoint counsel for them.[47] In noncapital cases the defendant was required to procure his own counsel or act for himself. The court had no power to make an appointment for him.[48] The holding that the

[41] *Id.* at 574, 173 So. at 452.

[42] Porter v. State, 193 Miss. 774, 10 So. 2d 377 (1942).

[43] Ferrell v. State, 208 Miss. 539, 544, 45 So. 2d 127, 130 (1950).

[44] *Id.* at 544, 45 So. 2d at 130.

[45] *E.g.*, Odom v. State, 205 Miss. 572, 37 So. 2d 300, *appeal dismissed*, 336 U.S. 932 (1948).

[46] Caldwell v. State, 176 Miss. 80, 84, 167 So. 779 (1936).

[47] 205 Miss. 572, 37 So. 2d 300, *appeal dismissed*, 336 U.S. 932 (1948).

[48] *E.g.*, Reed v. State, 143 Miss. 686, 109 So. 715 (1926).

court was without power to employ counsel in such a case was interpreted to mean "that no such power is conferred or required to be exercised by either the Constitution or laws of the State."[49] Thus, *Odom* settled the question until the recent decision of the Supreme Court of the United States, *Gideon v. Wainwright*, of whether or not a trial judge in this state is empowered to appoint an attorney to defend the accused in a noncapital case. In *Phenix v. State*, the Mississippi Supreme Court pointed out that the *Odom* case was appealed to the Supreme Court of the United States and that certiorari was denied.[50] Later cases reiterated the *Odom* holding.[51]

The court has held that failure to offer the accused benefit of counsel, where no such request was made does not vitiate a confession.[52] It has also been decided that if the defendant fails to request time in which to secure counsel, he cannot complain of error, especially when no request to employ counsel was denied when he was in jail prior to trial.[53]

The impracticality of reversing a decision of the trial court due to lack of counsel in a noncapital case was clearly pointed out by the court. "And . . . ordinarily, if we should reverse and remand such a case there would be no further step that could be taken by the trial court, since he is without authority to defend free of charge one charged with a noncapital felony and there is no provision of law for the payment of a free [sic] by the state or county in that behalf."[54]

The weight of authority in the United States supports the view that in the absence of statute an attorney appointed by the court to defend the indigent accused cannot recover a fee for his services.[55] Mississippi is aligned with this view. In an early Mississippi case, it was held that counsel assigned by the court to a person indicted for a capital offense who was unable to employ counsel could not recover from the Board of Supervisors of the county.[56] It has been held in a number of cases in the United States that it is the duty of the attorney to render gratuitous services.[57] The minority view holds that the attorney, even in the absence of statute, is entitled to compensation from the public.[58]

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[49]Odom v. State, 205 Miss. at 583, 37 So. 2d at 301.

[50]216 Miss. 1, 61 So. 2d 392 (1952).

[51]*E.g.*, Fogle v. State, 231 Miss. 746, 97 So. 2d 645 (1957); Conn v. State, 234 Miss. 137, 105 So. 2d 760 (1958).

[52]*E.g.*, Newell v. State, 209 Miss. 653, 48 So. 2d 332 (1950); Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949), *appeal dismissed, cert. denied*, 338 U.S. 844 (1949).

[53]*E.g.*, Dugan v. State, 151 Miss. 781, 119 So. 298 (1928).

[54]Odom v. State, 205 Miss. 572, 583, 37 So. 2d 300, 301 (1948).

[55]See Annot., 130 A.L.R. 1439 (1941); Annot. 144 A.L.R. 847 (1943).

[56]Dismukes v. Board of Supervisors, 58 Miss. 612 (1881).

[57]See Annot., 130 A.L.R. 1444 (1941).

[58]See Annot., 130 A.L.R. 1445 (1941); Annot., 144 A.L.R. 848 (1943).

It, perhaps, goes without saying that there is no requirement that a defendant in a noncapital case or in a capital case be represented by counsel. The accused is privileged to conduct his own defense in person.[59] In such event the same rules of procedure apply as when he is represented by counsel.[60] While in criminal prosecutions, section 26 of the constitution confers upon the accused the right to be heard by himself or counsel, or both, the court cannot require him to secure counsel, nor can it impose counsel upon him. Counsel can be appointed only when the defendant so requests.[61]

It is in the field of the noncapital cases that the state court was placed in something of a quandry. The requirements of the due process clause of the federal constitution, as interpreted by the Supreme Court of the United States, were fully met by adequate provisions for capital cases in the constitution of Mississippi. In Mississippi, the right to court-appointed counsel in capital cases when the defendant is unable to employ counsel is an age-old right. But, in Mississippi, as in several other states, the trial court was not empowered to appoint counsel in noncapital cases where the defendant was unable to employ an attorney. While the United States Supreme Court held repeatedly that the fourteenth amendment does not incorporate the guarantees of the sixth amendment in state criminal proceedings to afford counsel in every case, the *Betts* decision led to uncertainty for the application of the due process clause to state proceedings was not to be governed by hard and fast rules.[62] Every case appealed from a state tribunal to the United States Supreme Court was to be appraised by "the totality of facts" and if the absence of counsel in a noncapital case constituted "a denial of fundamental fairness" and was violative of the due process clause of the federal constitution, the decision of the state tribunal would be reversed. Thus the application of the "special circumstances" test involving the concept of "shocking to the universal sense of justice" might result in a reversal by the Supreme Court. What might be found "shocking to the universal sense of justice" in one case might not be found shocking in another. A certain set of circumstances might in one case be considered as demanding counsel for defendant in a noncapital offense, whereas a similar set of circumstances might not. The test was a subjective one. If the Court believed that the assistance of counsel might well have materially aided the petitioner in coping with several aspects of the case, a reversal might be in order, as it was in *Carnley v. Cochran*.[63] The state supreme court was heretofore faced with the fact

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[59]Dugan v. State, 151 Miss. 781, 119 So. 298 (1928).

[60]*Ibid.*

[61]Schwartz v. State, 103 Miss. 711, 60 So. 732 (1912).

[62]Betts v. Brady, 316 U.S. 455 (1942).

[63]369 U.S. 506 (1961). See 34 Miss. L.J. 117 (1962).

that while no power was conferred on trial courts to appoint counsel in noncapital cases, the United States Supreme Court might conclude that the special circumstances of the case demanded counsel for the defendant, although the state tribunal had found the defendant to have been afforded a fair and impartial trial. The vagueness of the *Betts* rule added an element of instability to noncapital cases before state tribunals.

In *Gideon*, the United States Supreme Court said, "Since 1942 . . . the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts."[64] The problem has been resolved by the *Gideon* decision of 1963. The indecision resulting from the earlier cases has been dispelled by the mandate that states must afford the accused assistance of counsel in noncapital as well as capital proceedings. It is interesting to note that the feeling of uncertainty arising out of the *Betts* decision is reflected in several recent decisions of the Supreme Court of Mississippi. While the court has proclaimed, in decision after decision, the law of the state in relation to appointment of counsel, and while it could not depart from the settled law of the state, nevertheless the influence of the *Betts* decision is discernible in the court's talking about "special circumstances." In the *Odom* case, the court engaged in a hypothetical and envisaged that under certain circumstances the court might reverse the decision of the lower court upon the theory that lack of counsel in a noncapital offense deprived the defendant of his liberty. The court said:

> . . . [A]ssuming that there may be cases to arise where it is conceivable that because of immaturity of a defendant, his financial inability has been made known to the Court and a request made that he be furnished such assistance, and where because of the nature of the charge and the complicated facts and circumstances connected therewith the assistance of an attorney is necessary, a state court may be justified in reversing and remanding a non-capital case for a new trial upon the theory that the accused has been deprived of his liberty without due process of law. . . .[65]

The court continued with an analysis of the special circumstances of the instant case. It pointed out that the record was silent as to whether or not the defendant requested the trial judge to assign counsel on his behalf. The court intimated that he was financially able to employ counsel of his own, since he was a business man. It spoke of his maturity in that the defendant was fifty-four years of age at the time of the trial. Further, his testimony and his questioning of witnesses

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[64]Gideon v. Wainwright, 83 Sup. Ct. 792, 793 (1963).

[65]Odom v. State, 205 Miss. 572, 586-87, 37 So. 2d 300, 303 (1948).

indicated, in the mind of the court, that he understood what needed to be developed on cross-examination and in the examination of his own witnesses.[66]

In another case, the court considered the age of the accused who was forty-five years old, and noted that he was a man of much worldly and court experience. Since he showed considerable ability in conducting his defense and there was no evidence that he was financially unable to obtain the services of a lawyer, the court held that there was no error on the part of the lower court in not appointing counsel for him.[67] In a later decision, the Supreme Court of Mississippi using the exact term of "special circumstances" advanced by *Betts* held that "no special circumstances exist here which would warrant a departure from that established rule"[68] that a trial court is not authorized to appoint counsel in noncapital felony cases. The appellant, the court said, is an adult of apparently normal intelligence. The lower court conducted the trial properly and the prosecuting officers exhibited fair conduct. The nature of the offense was simple, and the defense was therefore not complicated. The accused had a fair and impartial jury. The great weight of the evidence warranted a finding of guilty.[69]

IV. Consultation

The duty of the court to assign counsel for the defense of a person unable to obtain his own counsel means "much more than mere appointment of counsel."[70] One of the rights embodied in the appointment of counsel is the right of the defendant to consult with his lawyer, the same privilege that is afforded the defendant who employs counsel of his own. The right of consultation embraces the right to the advice of counsel at all stages of the proceedings. It was the *Powell* decision which identified in the law the concept of consultation with "effective aid"[71] in the preparation and trial of the case. It was this decision that proclaimed that the right of the accused, at least in a capital case, embraces the opportunity to have sufficient time to consult with the attorney and prepare for trial. It is one of the fundamental rights guaranteed by the due process clause of the fourteenth amendment.[72]

The court of Mississippi has said:

> The right of the accused to have counsel and the requirement that such counsel have free access to the accused em-

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[66]*Id.* at 587, 37 So. 2d at 303.

[67]Phenix v. State, 216 Miss. 1, 61 So. 2d 392 (1952).

[68]Fogle v. State, 231 Miss. 746, 753, 97 So. 2d 645, 648 (1957).

[69]*Ibid.*

[70]*E.g.*, Rogers v. State, 243 Miss. 219, 136 So. 2d 331 (1962).

[71]Powell v. Alabama, 287 U.S. 45 (1932).

[72]*Ibid.*

> bodies the right on the part of the accused to be represented by counsel who have conferred with him prior to trial so that the case may be properly prepared for trial. Among the first duties of counsel in preparing a capital case for trial is that of conferring with the accused, and it is a well known fact that no attorney can adequately represent one accused of a capital crime without such conference or conferences.[73]

The right to counsel does not accrue during the investigation, prior to trial. The presence of the defendant's lawyer after the suspect's arrest and during the interrogation of the officers is not a requirement. As far as having a lawyer present during such proceedings, there is no authority for the officers to compel the attendance of an attorney.[74]

In *McKenzie v. State,* counsel had never requested a conference with the prisoner.[75] Since the defense attorney had never been denied access to the accused, the supreme court said that the record suggested that trial counsel either neglected their duty to the court or failed to confer as a tactical maneuver. The court stated that ". . . in either event, its apparent approval by this court could have undesirable consequences in the administration of law in capital cases; . . . and we are content to say that if it had clearly appeared that there was willful neglect or that the failure to confer was a tactical maneuver, in either event, we would condemn it."[76] When it became apparent to the trial court that the counsel for defendant had not conferred with the accused prior to trial, it became the duty of the court to take appropriate steps to protect the defendant's rights. "Failure to do so was failure to follow the mandatory provisions of the statute and constituted a denial of due process guaranteed under the Constitution of the United States and the State of Mississippi. The right denied was a fundamental and not a technical one, and prejudice is presumed."[77]

The court has condemned proceedings when the record disclosed that the appointment of counsel for the defendant amounted to a mere formality.[78] The appellant was charged with murder in late April and an attorney was not appointed until early June when the accused was before the court for arraignment. The plea of guilty, which had been arranged before the indictment without knowledge of defendant's attorney, was entered thirty-five minutes after the appointment of counsel.[79] In another case, the defendant was placed in jail at 9 a.m. An indictment was returned at 2:30 p.m., and the defendant was immedi-

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[73]McKenzie v. State, 233 Miss. 216, 219, 101 So. 2d 651, 653 (1958).

[74]Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949).

[75]233 Miss. 216, 101 So. 2d 651 (1958).

[76]*Id.* at 220, 101 So. 2d at 653.

[77]*Id.* at 219-20, 101 So. 2d at 653.

[78]Rogers v. State, 243 Miss. 219, 131 So. 2d 331 (1962).

[79]*Ibid.*

ately arraigned and sentenced on his plea of guilty, without an opportunity to confer with his family, friends, or a lawyer. The court condemned such a proceeding as depriving the accused of his liberty without due process of law.[80]

The right of the defendant to consult with his lawyer ordinarily means the right to do so privately and at all reasonable times. However, reasonable limitations may be attached, which are within the sound discretion of the trial judge. If there is no abuse of such discretion, the supreme court will decline to interfere. A case in point involves the prosecution of a prisoner for the murder of a fellow prisoner at the state penitentiary. The trial court refused to permit counsel to confer with defendant and his witnesses out of the presence of prison guards. The court held that this was not denying counsel "free access to the prisoner" within the meaning of the statute. The court found no prejudice to the defendant.[81]

V. Withdrawal of Counsel

The sudden withdrawal of an attorney from a case may amount to a deprivation of liberty without due process of law. Where a defendant was left without legal representation when his case was called due to an apparent misunderstanding with his attorneys who failed to appear at the trial, and the newly employed attorneys were unfamiliar with the facts in the case, the Mississippi Supreme Court decided that a continuance should have been granted.[82] In *Gray v. State* the accused was placed on trial within fifteen or twenty minutes after his lawyers withdrew, thereby depriving him of the benefit of counsel.[83] The court here was of the opinion that the defendant was unable to make an adequate defense and was deprived of liberty without due process of law within the meaning of the Mississippi constitution.

If, however, a defendant is allowed reasonable time to procure another lawyer after his lawyer withdraws, he cannot get a continuance merely because he had just employed a new attorney, for the defendant is obliged to prepare for trial with due diligence.[84] Nor may a defendant claim that he has not had sufficient time to prepare for trial when he appeared through different counsel when no explanation was offered for the nonappearance of the first counsel who had represented him.[85] A delicate question was presented to the court in a case where one of the appointed counsel for the defense filed a petition to be

[80]Walters v. Ernest, 234 Miss. 315, 106 So. 2d 137 (1958).
[81]La Fontaine v. State, 223 Miss. 562, 78 So. 2d 600 (1955).
[82]Blakeney v. State, 228 Miss. 162, 87 So. 2d 472 (1956).
[83]223 Miss. 554, 78 So. 2d 588 (1955).
[84]Giles v. State, 150 Miss. 756, 116 So. 887 (1928).
[85]Bynum v. State, 222 Miss. 632, 76 So. 2d 821 (1955).

relieved on account of his close business and personal relations with the chief prosecuting witness. The attorney felt that he might unconsciously fail to represent his client properly. The trial judge denied the petition.[86] The Mississippi court found no ground here for reversal. The court remarked, "The presentation of this situation to the court was commendable and a performance of a duty by the attorney, because the accused has a constitutional right to the services of an attorney free to devote his entire energies and ability, unembarassed by other connections, to the defense of his case."[87] The subsequent proceedings, in the opinion of the court, demonstrated the soundness of the trial court's judgment. "The test," said the court, "is whether the accused has been protected so far as counsel can do, in all his legal rights."[88] In accordance with this rule, the court held the appellant here had no cause for complaint. It has been held that where the court appoints counsel for a number of defendants jointly indicted for a capital crime and later requests the withdrawal of the attorney from representing one of the defendants, on the theory that the defense of one might be inconsistent with the defense of the others, ordinarily the only defendant who might have a cause of complaint is the one who is deprived of the services of such attorney. The other codefendants cannot assign error to this action.[89]

VI. Presence of Counsel

While a defendant is entitled to have his attorney with him throughout the proceedings, there is no absolute rule that the presence of counsel must be required. If substantial justice is done, the appellate court will be reluctant to reverse on the grounds of absence of counsel. In *Schwartz v. State*, the defendants' counsel was not present when sentence was pronounced.[90] The Mississippi court said pointedly, "A lawyer who has a case in court, if he desires to be present, should promptly attend upon the court at the time fixed by the trial judge for the convening thereof; and there was no duty imposed upon the court to wait and send for counsel, in order that he might be in court when the jury rendered the verdict against his client."[91] In this case, the defendant made no request to have his attorney present before the verdict was rendered or sentence imposed upon him. The court declared that the appellant was denied no constitutional right. In one case, the court said that it was "regrettable" that the accused's counsel was

[86]Augustine v. State, 201 Miss. 277, 28 So. 2d 243 (1946).
[87]*Id.* at 293, 28 So. 2d at 247.
[88]*Id.* at 294, 28 So. 2d at 247-48.
[89]Hunter v. State, 137 Miss. 276, 102 So. 282 (1924).
[90]103 Miss. 711, 60 So. 732 (1913).
[91]*Id.* at 721, 60 So. at 734.

not present when the verdict was received, but since the jury was polled, defense counsel could have done nothing more and therefore no harm resulted from the absence of the counsel.[92] In a later and similar case, the court stated that it was not reversible error for the judge to receive the verdict in the absence of the defendant's counsel, if counsel was voluntarily absent from the courtroom when the judge polled the jury, and defendant made no objection or request for presence of his attorney.[93] In one instance, appellant contended that his constitutional rights had been abridged where the court heard a motion for continuance in the absence of his counsel. The court agreed that the motion should not have been heard under the circumstances, but the error, if any, was cured when the circuit judge granted a rehearing on the motion.[94]

VII. Effective Assistance of Counsel

The right of the criminally accused to effective assistance of counsel, closely allied with the right of consultation, includes the right of adequate time to prepare for trial. Section 26 of the Mississippi constitution guarantees to every person a fair and impartial trial and this has been construed to include "a reasonable opportunity to prepare for trial."[95] Where defendant's attorney was engaged in court in another part of the state and arrived only five minutes before the beginning of the trial, the court held that refusal to grant a continuance to permit the attorney to prepare for trial was an abuse of discretion and denied appellant's constitutional rights to a fair trial.[96] The supreme court declared, "Dispatch of courts, savings of costs in their operation, speedy trials are commendable in the trial judges, but zeal in these respects must have due regard for the rights of defendants. The right is more valuable than the savings."[97]

The Mississippi Code provides: "A denial of the continuance shall not be ground for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom."[98] The decisions interpreting the statute make the granting of a continuance a matter of discretion with the trial court. The supreme court has repeatedly held that the necessary time for the accused and his counsel to prepare for trial must necessarily be left to the sound discretion of the trial judge, bearing in mind the facts and circumstances of the particular case.[99] The dis-

[92]Penn v. State, 62 Miss. 450 (1884).

[93]Griffin v. State, 198 Miss. 205, 22 So. 2d 157 (1945).

[94]Scott v. State, 222 Miss. 175, 75 So. 2d 466 (1954).

[95]Cruthirds v. State, 190 Miss. 892, 896, 2 So. 2d 145, 146 (1941).

[96]*Ibid.*

[97]*Id.* at 898, 2 So. 2d at 146.

[98]Miss. Code Ann. § 1520 (1956).

[99]*E.g.*, Gilmore v. State, 225 Miss. 173, 82 So. 2d 838 (1955).

cretion must be a sound judicial one, paying due regard to the rights of the defendant and the public.[100] Unless the exercise of the discretion is manifestly abused, the supreme court will not disturb the decision of the trial court.[101] Where defendant was without counsel due to his own delay, the denial of defendant's motion for a continuance was upheld.[102] Where the defendant requested a continuance to obtain counsel and the court granted him one day and he made the same request the next day, the court's denial of the second request did not violate defendant's constitutional rights, especially in the light of defendant's clear understanding of the case and his examination of witnesses and the clear and convincing proof of his guilt.[103]

The defendant cannot complain merely because the trial followed promptly the commission of the crime.[104] It has been held that the trial court did not abuse its discretion, in trying the accused two weeks,[105] three months,[106] or five months[107] after the commission of the offense. In all such cases, the duty rests upon the defendant to exercise reasonable diligence in obtaining counsel. Where an indictment was returned at the September term and application for a continuance was not filed until February, the court's granting the attorney an additional ten days was held to be sufficient time.[108] In the instance where a continuance was denied on a third trial of rape, it was not a denial of effective legal aid, although the trial commenced fifteen days after the appointment of new counsel, since the attorneys had available the records, briefs, and court decisions of the two previous trials.[109] In one case it was held that defendant's motion for a continuance was properly denied when the indictment had been returned a year before the trial, although the attorney had just been employed. The court felt that the appellant had been afforded ample time to secure the services of counsel to represent him.[110] When defendants engaged a lawyer to obtain bail for them but for no other purpose, and were able but did not obtain counsel, a dismissal of application for a continuance was in order.[111] Under the circumstances of one case where

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[100]*E.g.*, Cruthirds v. State, 190 Miss. 892, 2 So. 2d 145 (1941).

[101]*E.g.*, Bynum v. State, 222 Miss. 632, 76 So. 2d 821 (1955).

[102]Gilmore v. State, 225 Miss. 173, 82 So. 2d 838 (1955).

[103]Poole v. State, 229 Miss. 176, 90 So. 2d 212 (1956), *cert. denied*, 353 U.S. 988 (1957).

[104]Freeman v. State, 29 So. 75 (Miss. 1901).

[105]Gallego v. State, 222 Miss. 719, 77 So. 2d 321 (1955).

[106]Bolin v. State, 209 Miss. 866, 48 So. 2d 581 (1950).

[107]Scott v. State, 222 Miss. 175, 75 So. 2d 466 (1954).

[108]McClellan v. State, 183 Miss. 184, 184 So. 307 (1938).

[109]McGee v. State, 40 So. 2d 160 (Miss. 1949), *cert. denied*, 338 U.S. 805, *rehearing denied*, 339 U.S. 958 (1950).

[110]Perkins v. State, 229 Miss. 299, 90 So. 2d 650 (1956).

[111]Bolin v. State, 209 Miss. 866, 48 So. 2d 581 (1950).

the defendant was bound over to await grand jury action, defendant should have realized that an indictment was a practical certainty and he should have taken steps at that time to employ counsel. The refusal of a continuance to enable counsel belatedly engaged to prepare for trial was not an abuse in the discretion of the court.[112] Where no proof that any other witnesses would have been available if more time had been extended to defense counsel, the motion for continuance was properly overruled.[113]

The accused may waive the right to a reasonable time to prepare for trial. In the instance where the accused had the benefit of able counsel and no application for delay was introduced, the conviction was not reversed because the indictment and trial followed closely after the crime.[114] The supreme court considered that there was no sound reason for the court to have acted therein on its own volition. In a similar situation where the court delayed the case for two days to enable counsel to have time to prepare, and the trial proceeded on the new date set without objection, the lower court was held to have granted sufficient time for preparation by defense counsel.[115]

In one case, defendant argued that he had insufficient time to prepare a motion for a new trial in that he was allowed but one hour and fifteen minutes. The supreme court found that there was nothing complicated about the preparation of the motion and the time given was apparently sufficient.[116] In a situation where defendant had made unsuccessful motions for continuance on the ground of the need for additional time for preparation but had failed to offer evidence or affidavits required by statute to support the motions and had not assigned as errors the denial of continuance in his motion for a new trial, he was prohibited on appeal to assign denial of motions for continuance as error.[117] The appellant here failed to comply with the long established rules of *Lamar v. State*.[118] In one case, an agreement was made between counsel for the defense and for the state to the effect that the case would not be brought to trial before a given date. The announcement was made in the hearing of the court. However, in the absence of the leading counsel for the defense, the accused was forced to trial prior to the agreed time. The supreme court held that the defendant was thereby prejudiced in his trial, that the agreement

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[112]Hathorn v. State, 225 Miss. 77, 82 So. 2d 653 (1955).

[113]Garner v. State, 202 Miss. 21, 30 So. 2d 413 (1947); Coggins v. State, 234 Miss. 369, 106 So. 2d 388 (1958).

[114]Franklin v. State, 189 Miss. 142, 196 So. 787 (1940).

[115]Gatlin v. State, 219 Miss. 167, 68 So. 2d 291 (1953).

[116]Gallego v. State, 222 Miss. 719, 77 So. 2d 321 (1955).

[117]Robinson v. State, 223 Miss. 70, 77 So. 2d 265, *cert. denied*, 350 U.S. 851 (1955).

[118]63 Miss. 265 (1885).

should have been carried out, and the trial should be postponed, especially when so grave an issue was involved as the death sentence. This warranted a reversal.[119]

VIII. The Trial

The due process clauses of the federal and state constitutions were intended to guarantee to every person the protection of his fundamental rights so that a fair trial may be had, and when fundamental and constitutional rights are ignored due process does not exist.[120] Therefore, a trial must be conducted in accordance with established criminal procedures, and an adequate opportunity to be heard must be afforded the accused.[121] If the conduct of the trial results in a denial of a fair and impartial trial, the defendant is entitled to another trial even though the evidence in the first trial pointed unmistakably to his guilt.[122]

Due process requires that a man be capable of conducting his defense in a rational manner, and if he is mentally incapable of conferring with his attorneys, if he cannot remember and relate the facts upon which his case rests, he shall not be placed on trial, whether his condition is temporary or permanent.[123] When the accused is physically unable to confer intelligently with his counsel and too ill to stand trial, as attested to by physicians, he has a constitutional right not to be tried under these circumstances.[124] However, where defendant claimed that he was physically and mentally incapable of cooperating with his counsel during trial, the incapacity allegedly arising from a wound in the leg, a denial of a continuance was held not to be reversible error since he displayed full knowledge of the matters complained of and made no effort to present them to the court.[125] The court maintained that "he was given full opportunity to be heard, and the guaranty of due process does not require more than one such opportunity. Every person must have his day in court; but this is singular, not plural."[126]

Disagreement between defendant's counsel does not deprive the accused of his constitutional rights to representation by counsel.[127]

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[119]Burrell v. State, 96 Miss. 202, 50 So. 694 (1909).

[120]*E.g.*, Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

[121]*E.g.*, Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953).

[122]*E.g.*, Scarbrough v. State, 204 Miss. 487, 37 So. 2d 748 (1948).

[123]*E.g.*, Carter v. State, 198 Miss. 523, 21 So. 2d 404 (1945).

[124]*E.g.*, Eastland v. State, 223 Miss. 195, 78 So. 2d 127 (1955).

[125]Simmons v. State, 197 Miss. 326, 20 So. 2d 64, *appeal dismissed, cert. denied*, 324 U.S. 821 (1945).

[126]*Id.* at 330, 20 So. 2d at 64.

[127]*E.g.*, Belina v. State, 228 Miss. 330, 87 So. 2d 919, *cert. denied*, 352 U.S. 936 (1956).

In one case, defendant was deprived of his constitutional right to be heard when the court refused to grant him permission to testify that his confession was not free and voluntary at the close of the state's evidence upon preliminary hearing. The court concluded that "the right to be heard" means right to be heard at the proper time and it cannot be postponed to a time when it may be less favorable to the defendant.[128]

IX. Competence of Counsel

Intimation of inadequacy amounting to denial of due process was held not to be justified because counsel failed to file motion for a new trial.[129] Failure to call certain witnesses when there was no showing what the testimony would be or whether it would be relevant was not considered by the court to be a denial of due process of law.[130] A new trial will not be granted when the alleged injustice of the verdict was due to the incompetency of counsel or defendant in their failing to have witnesses present on the day of trial when throughout the proceedings the witnesses were not produced in court and no explanation was forthcoming.[131] The supreme court remarked:

> The record in the case before us demonstrates, beyond the shadow of a doubt, that . . . [appellant's lawyer] was fully advised in the premises, and, while he may not have defended the case as a member of this court would have, or as counsel who represent the appellant, it is unthinkable that an appellate court shall turn aside to investigate the record to see if, perchance, some point was not made by appellant's counsel or some evidence not presented which this court might think would have been advantageous to the appellant.[132]

In a case in which the attorney did not present a plea of insanity, it was held that there was no just basis on the evidence for claiming that the attorney was negligent.[133] However, the court has not hesitated to reverse when defendant's counsel was obviously incompetent.[134] Where there was not a single objection to the violation of the accused's constitutional rights, the supreme court acted to protect the rights of the defendant. "Only errors so grave," said the court, "as to deny the benefit of some fundamental right are considered where a jury, under the law and the evidence could reach no other verdict than that of guilty. . . . Errors affecting fundamental rights are exceptions to the rule that questions

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[128]Warren v. State, 174 Miss. 63, 164 So. 234 (1935).

[129]Dobbs v. State, 200 Miss. 595, 27 So. 2d 551 (1946), *suggestion of error overruled*, 29 So. 2d 84 (1947), *appeal dismissed, cert. denied*, 331 U.S. 787 (1947).

[130]Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

[131]Carraway v. State, 170 Miss. 685, 154 So. 306 (1934).

[132]*Id.* at 690, 154 So. at 308.

[133]Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937).

[134]Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

not raised in the trial court cannot be raised for the first time on appeal."[135]

X. Conclusion

The United States rejected the rule of the common law that persons charged with treason or felony were not permitted representation by counsel. It was prescribed through the sixth amendment that the accused has the right to the assistance of counsel in federal criminal prosecutions. The amendment and congressional legislation were construed prior to 1938 in the restrictive sense that the right of representation by counsel in the federal courts was limited to the accused's privilege of employing his own counsel, and assignment of counsel by the court was required only in capital cases.[136] The states were closely paralleled in their understanding of the right to counsel in criminal cases. In Mississippi, the right of the accused to be heard by himself or counsel, or both, was provided for in the constitution.[137] Requirement of assignment of counsel by the court in capital cases for a person unable to employ counsel has been written into the law of the state.[138] While in Mississippi the right to assignment of counsel by the court remained restricted to capital cases until the United States Supreme Court's decision in *Gideon*, the right to court-assigned counsel in federal criminal cases embraced both capital and noncapital offenses, since *Johnson v. Zerbst* in 1938. The right was embodied in the Rules of Criminal Procedure in 1946.[139] This presented the anomaly that it was due process of law for the accused before a state court in Mississippi to be denied assignment of counsel in noncapital cases, whereas it was due process before a federal court for the same offense to require the benefit of counsel. From the standpoint of any universal sense of justice, due process of law should have had the same meaning in state courts as in federal courts.

This has now been achieved in the *Gideon* decision of 1963. Appointment of counsel is considered a fundamental right, essential to a fair trial, and the right embraces the indigent defendant in all criminal cases in federal and state courts.[140] The Supreme Court in *Gideon* pointed out that state and federal governments spend great sums of money for the machinery to try persons charged with crime, and hire attorneys to prosecute the cases in the public's interest. Few men charged with crime will fail to employ the best lawyers they can

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[135]*Id.* at 155, 46 So. 2d at 97.

[136]See Cross, *"The Assistance of Counsel for His Defense": Is This Becoming A Meaningless Guaranty?* 38 A.B.A.J. 995 (1952).

[137]Miss. Const. art. 3, § 26.

[138]Miss. Code Ann. § 2505 (1956).

[139]Fed. R. Crim. P. 44.

[140]Gideon v. Wainwright, 83 Sup. Ct. 792 (1963).

afford. The Court observed that it is a "widespread belief that lawyers in criminal courts are necessities, not luxuries."[141] From the early days of our history, the American people through their state and federal constitutions and laws "have laid great stress on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[142] This ideal cannot be reached if the poor man must come to trial without legal aid.[143]

The Supreme Court in the *Gideon* case quoted the words of Mr. Justice Sutherland in *Powell v. Alabama*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[144]

In the light of the *Gideon* decision, a statute is anticipated in Mississippi providing for court-assigned counsel in all criminal cases where the defendant is unable to secure counsel of his own. This will necessitate a comprehensive and analytical study. The problems involved are numerous. The assigned attorney system is not without serious objections.[145] Cases are frequently assigned to the young, inexperienced lawyer with the idea that it will afford him some experience. The lawyer, mature in practice, is hesitant to accept such assignments which may mean neglect of his clients. The fee permitted the attorney by statute is more than modest in terms of the present-day value of the dollar. Designed to correct this situation a public defender system has been inaugurated in some areas. Whether the present assignment system should be retained, or facilities provided through legal aid societies, or a public or voluntary defender system be inaugurated are questions which call for careful study.

Sylvester John Hemleben

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[141] *Id.* at 796.

[142] *Ibid.*

[143] *Ibid.*

[144] 287 U.S. 45, 68-69 (1932).

[145] See Rubin, *Justice for the Indigent: The Need for Public Defenders*, 39 A.B.A.J. 893 (1953).

GRANTOR'S POSSESSION AS CONSTRUCTIVE NOTICE

I. Introduction

It is elementary that today states have varying types of recording statutes, some providing that a conveyance, if not recorded, is invalid as against a subsequent purchaser for value without notice, and some not even mentioning the matter of good faith or notice. However, nearly all the statutes have received the same interpretation, as affording protection to a subsequent purchaser only when he is without notice of the unrecorded conveyance. The subsequent purchaser is considered to be affected with notice when he knows of facts or circumstances which should induce further investigations, which investigations, if actually made, would produce actual knowledge of a prior conveyance.[1] One such circumstance which will impart notice to the subsequent purchaser is possession. Generally, before the recording statutes were enacted, possession was notice of ownership, and a conveyance made by a party out of possession was void.[2] This is the historical basis for today's proposition that possession by a stranger to the title is notice to the world of all the rights the possessor has therein, legal or equitable. This proposition is fairly well settled in all jurisdictions.[3] However, there is a pronounced conflict of authority as to whether the subsequent purchaser has notice of the prior grantor's adverse claim where the grantor remains in possession of the land after the deed is conveyed.[4]

II. Majority Rule

As a general rule, possession is notice of all legal and equitable rights of the possessor.[5] A majority of the states, however, make an exception to the general rule when the grantor remains in possession, and hold that grantor's possession is not inconsistent with the title which he conveyed.[6] Thus, the majority rule appears to be that since the subsequent purchaser is justified in relying on the ostensible title conferred by the deed, the grantor's continued possession is not notice of any claims in the title by the grantor.

Numerous reasons are given for the majority rule. An early Michigan case stated:

> . . . [T]he object of the law in holding such possession constructive notice, where it has been so held, is to protect the

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[1]See 6 Powell, Real Property ¶ 916 (1958).

[2]See, *e.g.*, Toland v. Corey, 6 Utah 392, 24 Pac. 190 (1890).

[3]See 39 Am. Jur. *Notice and Notices* § 18 (1942).

[4]See *id.* § 19.

[5]*Ibid.*

[6]*Ibid.*

> possessor from the acts of others who do not derive their title from him—not to protect him against *his own acts*, and especially against his own deed. If a party executes and delivers to another a solemn deed of conveyance of the land itself, and suffers that deed to go upon record, he says to all the world, 'whatever right I have, or may have claimed to have in this land, I have conveyed to my grantee; and though I am yet in possession, it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance to my grantee.'[7]

A variety of reasons for the majority rule was set out in a Florida decision.[8] In that case the grantor gave a warranty deed to his grantee and at the same time received, in return, a life estate in the property. The deed was recorded, but the agreement conveying back a life estate was not recorded. The grantor remained in possession. The grantee subsequently mortgaged the land to a third party. The court held that the grantor was estopped from disputing the record title since failure to record the written agreement constituted negligence and one should not profit from his own negligence. The court further held that even if notice was implied by possession, it is rebutted by the strong presumption which attaches in favor of the recorded deed as against any secret reservations. And finally the court said that where two innocent parties must suffer, the one whose negligence caused the mistake must bear the burden. A Tennessee case recognized the exception to the general rule on the grounds that it is consistent with the general policy and purpose of the registration laws.[9] Although the reasons given by the courts for the majority rule are numerous and varied, the controlling fact appears to be that the grantor retains possession merely at the sufferance of the grantee and not by reason of any interest retained by him. It should also be noted that in nearly all these cases great emphasis is placed on the fact that the original deed was recorded.[10]

The majority rule is subject to the qualification, in many jurisdictions, that if a grantor continues in possession for a considerable length of time, such possession is sufficient to impart notice of rights inconsistent with his conveyance.[11] There is no such qualification in Mississippi.[12] In those jurisdictions where this qualification is recognized, the length of time required for possession to impart notice varies. For example, one jurisdiction suggests that for notice to be imparted there must be possession for such length of time as would be incon-

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[7]Bloomer v. Henderson, 8 Mich. 395, 404, 77 Am. Dec. 453 (1860).

[8]See Reasoner v. Fiskelli, 114 Fla. 102, 153 So. 98 (1934). *But see* Williams v. Markey-Harmon Co., 145 Fla. 201, 198 So. 825 (1940).

[9]Strong v. Efficiency Apartment Corp., 159 Tenn. 337, 17 S.W.2d 1 (1929).

[10]See Annot., 105 A.L.R. 853 (1936).

[11]See, *e.g.*, Turman v. Bell, 54 Ark. 273, 15 S.W. 886 (1891).

[12]*E.g.*, Jones v. Grimes, 115 Miss. 874, 76 So. 735 (1917).

sistent with the idea of retaining possession at the sufference of the grantee.[13] Five months,[14] six years,[15] "a long period,"[16] and a "considerable length" of time[17] have been held sufficient to impart notice, while three days,[18] one month,[19] four months,[20] and four and one-half years[21] have been held insufficient to impart notice.

III. Minority Rule

A number of jurisdictions follow the rule that possession is notice of all the rights of the possessor, legal and equitable, "thus making the continued possession of a grantor quite as efficacious a notice of his claims as the possession of a stranger to the record title would be."[22] Those jurisdictions insist that there is no real reason for distinguishing between possession by the grantor and possession by a stranger to the title. If the public records indicate that the title is in someone else, the subsequent purchaser should not rely entirely upon the record, but should take notice of the rights of those who are in possession.[23] The recording statutes were not intended to change the rule that possession was notice to the world of all the rights of the possessor, but rather to afford the means of preserving the chain of title and give notice of the ownership of unoccupied lands.[24]

In an early Minnesota case which held that there was no good reason for distinguishing between possession by the grantor after delivery of his deed and possession by a stranger to the record title, the court stated:

> In either case the possession is a fact inconsistent with the record title, and, if possession by the stranger is sufficient to make it obligatory upon a purchaser to ascertain his right, possession by the grantor is a circumstance entitled to equal consideration. An absolute deed divests the grantor of the right of possession as well as of the legal title, and when he is found in possession after delivery of his deed it is a fact inconsistent with the legal effect of the deed, and is suggestive that he still retains some interest in the premises. Under such circumstances, a pur-

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[13]Shafer v. Killpack, 53 Utah 468, 173 Pac. 948 (1918).

[14]Hass v. Gregg, 52 Okla. 51, 152 Pac. 1126 (1915).

[15]Anderson v. Bannwell, 52 S.W.2d 96 (Tex. Civ. App. 1932), *aff'd* 126 Tex. 182, 86 S.W.2d 41 (1935).

[16]Ramirez v. Smith, 56 S.W.2d 254 (Tex. Civ. App. 1900).

[17]Turman v. Bell, 54 Ark. 273, 15 S.W. 886 (1891).

[18]Handelman v. Mandel, 70 Colo. 136, 197 Pac. 1021 (1921).

[19]Wicklein v. Kidd, 149 Md. 412, 131 Atl. 780 (1926).

[20]Rowsey v. Jameson, 46 Okla. 780, 149 Pac. 880 (1915).

[21]Roberts v. Bass, 111 So. 2d 455 (Fla. 1959).

[22]39 Am. Jur. *Notice and Notices* § 19 (1942).

[23]See Dennis v. Northern Pac. Ry. Co., 20 Wash. 320, 55 Pac. 210 (1898).

[24]See Toland v. Corey, 6 Utah 392, 24 Pac. 190 (1890).

> chaser has no right 'to give controlling prominence to the legal effect of the deed,' in disregard of the other 'notorious antagonistic fact,' that the grantor remains in possession just as if he had not conveyed.[25]

The court further held:

> To say that the grantor is estopped by his deed is begging the question; for, if his possession is notice to third parties of his rights, there is no principal of estoppel that would prevent him from asserting against purchasers or creditors any claim to the premises which he might assert against his grantee.[26]

A Georgia court has held that continued possession by the grantor after an absolute sale is prima facie evidence of fraud since by the terms of the deed the grantor has no right of possession.[27] It follows that such continuing possession rests upon a right not disclosed by the records. Thus, it becomes incumbent upon the one claiming under the grantee to make inquiry to determine whether this badge of fraud is real or apparent.

In at least one state, the courts have placed a time limit qualification on the minority rule. The court refused to allow possession of the grantor to be notice where the grantee sold to a purchaser a few hours after obtaining the deed.[28] Dictum in a California case suggests that possession must have continued long enough to indicate to one who knows only the fact of possession that the grantor has remained in possession.[29]

The minority rule is subject to the qualification that possession by a stranger to the record title is notice. The possession must be open, notorious, and unequivocal, and under such circumstances as do not suggest a consistent claim.[30] For example, in one case a father and son were living together on a farm. The father conveyed to his son and the deed was recorded. The son, in turn, reconveyed to his father, but the deed was not recorded. Possession by the grantor was held not to be notice because for such possession to be notice it must be exclusive, *i.e.*, it must be more than father living with son.[31] Possession is notice of only such facts as inquiry of the occupant would disclose,[32] and if grantor explains his possession in a manner consistent with the right of his grantee to convey, grantor cannot attack the conveyances of

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[25]Groff v. State Bank of Minneapolis, 50 Minn. 234, 235, 52 N.W. 651, 652 (1892).
[26]*Ibid.*
[27]See Chandler v. Georgia Chem. Works, 182 Ga. 419, 185 S.E. 787 (1936).
[28]Evans v. Bryan, 202 Ala. 484, 80 So. 868 (1919).
[29]Austin v. Pulschen, 112 Cal. 528, 44 Pac. 788 (1896).
[30]*E.g.*, Rankin v. Coar, 46 N.J. Eq. 566, 22 Atl. 177 (Ch. 1890).
[31]Olson v. Olson, 203 Minn. 199, 281 N.W. 367 (1938).
[32]*E.g.*, Nelson v. Joshel, 305 Ill. 420, 137 N.E. 389 (1922).

the grantee.[33] Neither can the doctrine be extended to a case where the grantor has expressly relinquished all equitable claims in his deed.[34]

IV. The Rule as Applied in Mississippi

In *Hafter v. Strange*,[35] plaintiff, being unable to read and thinking she was conveying only one lot, conveyed the entire tract to her grandson. The grandson recorded the deed and sold most of the tract to defendant. Plaintiff remained in possession of the land from the date of the execution of the deed. The court, in holding that plaintiff's continued possession was not notice, recognized that possession by one claiming some interest in the land is notice to the world of that claim, but went on to say:

> . . . [I]t has never been held that such possession is notice of claim as against the recorded conveyance by the occupant. Certainly a solemn deed is the equivalent of an assertion by the party grantor that the title is in the grantee; its purpose is to convey and show title, and he who thereby invests another with this universally recognized evidence of right ought not, as against one who deals with that other upon the faith of such evidence, be permitted to aver to the contrary to his injury.[36]

A later case, involving a charge of fraud, reaffirmed the Mississippi position and held that grantor's continued possession was not notice since the recorded deed was notice to the world that the title had been conveyed to the grantee, and the subsequent purchasers had relied upon that record.[37] The court said that to allow such possession to be notice would be to "defeat one of the main objects of our laws regarding the recording of conveyances."[38] The court also held that in Mississippi the rule is not subject to the qualification that where the possession of the grantor is long continued a purchaser or mortgagee is put upon notice.

Although the majority rule seems firmly established in Mississippi law, there are several decisions which imply a contrary rule, or at least an exception to the majority rule as set out in the *Hafter* case. In a later decision,[39] the grantor executed an absolute deed to the grantee with the clear intention of securing the collection of money which the grantee had fraudulently led grantor to believe he had paid out for her. The consideration recited in the deed was $10 plus

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[33]Turman v. Bell, 54 Ark. 273, 15 S.W. 886 (1891).

[34]*E.g.*, Sanguinetti v. Rossen, 12 Cal. App. 623, 107 Pac. 560, 564 (Ct. App. 1910).

[35]65 Miss. 323, 3 So. 190 (1887).

[36]*Id.* at 327, 3 So. at 191.

[37]See Jones v. Grimes, 115 Miss. 874, 76 So. 735 (1917).

[38]*Id.* at 878, 76 So. at 736.

[39]Baldwin v. Anderson, 103 Miss. 462, 60 So. 578 (1913).

the payment of a debt amounting to $350. The deed was duly recorded, but grantor remained in possession. Grantee sold the land to a subsequent purchaser for $1,000. The court recognized the rule of *Hafter v. Strange,* but held that purchaser did have notice because there was an inadequacy of consideration recited in the original deed. The court said that a slight investigation would have led purchaser to a knowledge of the true state of the title, therefore, he must be charged with knowledge, for whatever is enough to excite attention is notice of everything to which such attention might reasonably disclose.

In another Mississippi case,[40] the grantee desired to buy 80 acres of land out of a 200 acre tract from the grantor, a widow. The grantor gave grantee a deed, which was recorded, for the entire 200 acre tract, and grantee immediately transferred 120 acres back to the grantor. Grantee also executed a deed of trust to secure the purchase price. Neither the second deed nor the deed of trust was recorded. Grantor remained in possession of the 120 acre tract. The grantee later sold the entire 200 acre tract to a third party. The court held that this case was distinguishable from *Hafter v. Strange* on the ground that grantor was using the 120 acres as part of her homestead. The court further stated that the purchaser should not have relied upon the fact that there was a recorded deed to the entire tract from the grantor to grantee, since inquiry should have been excited by the fact that grantor was in possession of the land, occupying it as part of her homestead.

A recent decision[41] involved the faulty description of a tract of land whereby the grantee actually obtained more than he intended to buy and more than grantor intended to sell. The grantor enclosed the entire tract except for the lot actually intended to be sold. The initial grantee sold to an intermediate purchaser who in turn sold to a subsequent purchaser, defendant in this action. The defendant insisted that his lot consisted of the land described in the deed. The court held that defendant was not a bona fide purchaser without notice since he had notice of facts sufficient to put him upon inquiry separate and apart from the fact that grantor remained in possession. The court did not specifically state the facts which should have put him on inquiry, but reference was made to the fact that both the initial grantee and the intermediate purchaser had intended to purchase only that lot which they occupied. However, in reading the decision it becomes apparent that the real fact which placed the defendant upon notice was the grantor's continued possession of all the land except that lot actually intended to be sold.

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[40]Breland v. Parker, 150 Miss. 476, 116 So. 879 (1928).

[41]Crawford v. Brown, 215 Miss. 489, 61 So. 2d 344 (1952).

In a 1919 Mississippi case,[42] the grantor had transferred certain property to his agent, and the deed was recorded. Later, when the agent quit the employment of grantor, the property was reconveyed to the grantor, but the deed was not recorded. Shortly thereafter the agent sold the property to a third party, but in the meantime, the grantor had given a deed of trust on the land which was recorded. Grantor was in possession throughout the transactions. The court held that the subsequent purchaser was not a bona fide purchaser without notice as he had seen the recorded deed of trust, and since he knew that the agent had once worked for the grantor, and he knew that the agent was in financial trouble. Although the court does not so state, it is obvious that primary importance was also placed on the fact of grantor's continued possession.

V. Conclusion

In reading the many Mississippi cases involving the question of whether grantor's continued possession is notice to a subsequent purchaser, it becomes readily apparent that while professing to follow the majority rule[43] the court can and will circumvent the rule if it so chooses.[44] In circumventing the rule the court has always said that something more than possession must be found, for example, recital of inadequate consideration,[45] grantor in possession of homestead,[46] a recorded deed of trust,[47] or knowledge of a contrary intention by an intermediate grantee.[48] The court has never said exactly how much more, coupled with continuing possession, is required to impart notice. The tests are many, varied, and ambiguous with no real criterion to follow. Obviously in practically every case, something more than mere possession can be found by an inventive judge. Apparently, in cases where there is continuing possession by the grantor, and it appears equitable and just, the judge will find "something more than mere possession," and hold that purchaser was not bona fide without notice.

It is further submitted that instead of trying to circumvent the majority rule in a haphazard fashion Mississippi should adopt the minority rule. If possession is notice for one purpose it should be notice for all purposes. For example, is it not reasonable to assume that if the grantor, after giving an absolute deed to grantee, remained on the property in adverse possession for the statutory period, he should re-

[42] Biles v. Walker, 121 Miss. 98, 83 So. 411 (1919).

[43] *E.g.*, Hafter v. Strange, 65 Miss. 323, 3 So. 190 (1887).

[44] See, *e.g.*, Baldwin v. Anderson, 103 Miss. 462, 60 So. 578 (1913).

[45] See, *e.g.*, Bowen v. Thornton, 227 Miss. 562, 86 So. 2d 505 (1956).

[46] *E.g.*, Breland v. Parker, 150 Miss. 476, 111 So. 879 (1928).

[47] *E.g.*, Biles v. Walker, 121 Miss. 98, 83 So. 411 (1919).

[48] *E.g.*, Crawford v. Brown, 215 Miss. 489, 61 So. 2d 344 (1952).

acquire title to the land? Most textbook writers have been extremely critical of the majority rule. One authority, after surveying the reasoning behind the majority rule, criticises it by stating:

> . . . [I]t imputes to a conveyance an effect as a declaration by the grantor, for the purpose of raising an estoppel against him, which is not necessarily in accord with the understanding of the parties or with the legal effect of the conveyance. One executing, for instance, a conveyance of a fee simple title may perfectly well acquire, by the same or a subsequent transaction, an equity against the grantee or a lease for a limited period, and it is difficult to see why his conveyance should be regarded as a declaration that he has not acquired, or will not acquire, such an interest, or why a subsequent purchaser should be justified in assuming, for the purpose of being relieved from any duty of inquiry, that the grantor's continuance in possession is wrongful rather than rightful.[49]

Another authority states that the reason for the majority rule is that as between two innocent parties, he whose negligence caused the loss should bear the burden. However, this authority goes on to state that, ". . . such reasoning is no more effective here than in the case of any other possessor who has rights not appearing on the record."[50] Possession is ordinarily notice of a claim of right. An absolute deed denies the right to continue in open, exclusive, and notorious possession at the time of the grant and for a considerable time thereafter. If this is true, then is it not a reasonable implication that the possession is an assertion of a reserved right and a limitation upon the provisions of the deed?

Richard M. Edmonson

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[49] 5 TIFFANY, REAL PROPERTY § 1292, at 76 (3rd ed. 1939).

[50] 4 AMERICAN LAW OF PROPERTY § 17.14 (Casner ed. 1952).

DIRECT RESTRAINTS ON THE ALIENATION OF PROPERTY IN MISSISSIPPI

I. Introduction

A direct restraint on alienation has been defined as ". . . a provision in a deed, will, contract, or other instrument, which by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation."[1] A direct restraint on alienation, then, might attempt to suspend the grantee's power to convey or dispose of his property at all; or it might cause the grantee to be penalized, by the property going over to a third person or reverting back to the grantor, if the grantee attempts to convey or dispose of it in violation of the restriction.

From the early history of the English common law it has been thought socially and economically desirable for an owner of an interest in property to have the power to transfer his interest therein.[2] Thus, the power of alienation has commonly come to be regarded as one of the inherent characteristics of property ownership.[3] It has been found, however, that certain types of restraints on alienation are beneficial, and the courts have upheld them. It is the purpose of this discussion to show the extent to which the courts in Mississippi and other jurisdictions have balanced the beneficial characteristics of direct restraints on alienation with the general policy of law favoring freedom of alienation.

II. Direct Restraints and Public Policy

The rule against restraints on alienation and the Rule Against Perpetuities accomplish the same fundamental purpose. The two rules, however, preserve the alienability of property by quite different means. The Rule Against Perpetuities prescribes a period of time within which an interest in land must vest if it is to be a valid interest,[4] thereby preventing an owner from making property inalienable by the creation of future interests that are too remote. The rule against direct restraints on alienation prevents the making of vested interests inalienable.[5] These direct restraints have taken two general forms.[6] One form is the insertion in the instrument of a provision stating that any attempted alienation of the property by the conveyee shall cause a forfeiture of the conveyee's interest. These "forfeiture clauses" are usually

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[1] Simes & Smith, The Law of Future Interest, § 1131 (2d ed. 1958).

[2] See 6 American Law of Property § 26.1 (Casner ed. 1952).

[3] *Ibid.*

[4] See Gray, The Rule Against Perpetuities, § 201 (4th ed. 1942).

[5] *Id.* at § 268.

[6] See 6 American Law of Property § 26.2 (Casner ed. 1952).

in the form of a reservation by the conveyor of a right of re-entry exercisable upon alienation by the conveyee, or an express limitation over to another person if the conveyee attempts alienation.[7] The second form that direct restraints have sometimes taken is one which withholds all power from the conveyee to transfer the property. These "disabling restraints,"[8] when upheld, render any attempted transfer of the property null and void, and the property remains in the ownership of the conveyee just as if he had made no attempt to transfer it.[9]

The undesirable consequences which result when restraints on alienation are upheld are numerous. Such restraints take property out of commerce, and if widely employed, would likely result in an undesirable increase in the price of land. Another result would be a concentration of wealth in those who owned land. Such restraints would discourage improvements upon land that could not be sold, thus possibly retarding the development of sections of a community.[10] If restraints upon involuntary alienations were held valid a system of restraints would be sanctioned by our legal system which would permit a debtor to continue in the enjoyment of the benefits of property and simultaneously refuse payments of his debts.[11]

In dealing with direct restraints, the courts have recognized situations where restraints bring about socially desirable results, one of which is the preservation of a source of income for an imprudent relative.[12] A limited restraint on alienation could satisfy the need of the developers of great urban areas for some degree of temporary control over the ownership of the lots in order to protect early purchasers and insure a return of the usual large capital outlay.[13] Another socially desirable objective attainable by direct restraints is the protection of a remainderman or reversioner from the sale of a life estate (which is not readily marketable anyway) to a conveyee who might not have a due regard for the rights of the reversioner or remainderman.[14]

III. Restraints on Equitable Estates

One of the first cases in Mississippi to consider a direct restraint on the alienation of property was *Leigh v. Harrison*.[15] The testatrix

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[7]See *Ibid.*

[8]See Schnebly, *Restraints Upon the Alienation of Legal Interest*, 44 Yale L.J. 961 (1935).

[9]See *Ibid.*

[10]See 6 American Law of Property § 26.3 (Casner ed. 1952).

[11]*Ibid.*

[12]See, *e.g.*, Leigh v. Harrison, 69 Miss. 923, 11 So. 604 (1892).

[13]See, *e.g.*, Northwest Real Estate Co. v. Serio, 156 Md. 229, 144 Atl. 245 (1929) (dissent).

[14]See 6 American Law of Property § 26.48 (Casner ed. 1952).

[15]69 Miss. 923, 11 So. 604 (1892).

set up an active trust for the support of her son for his life, with remainder in fee to testatrix's daughter. The court stated that a judgment creditor of the son could not subject the income of the trust to the payment of the son's debts. The court based its decision upon two lines of reasoning. First, since the trustee had the power of discretion in the payment of the income to the son, there was no equitable estate owned by the son which could be made subject to the claims of creditors, and the creditors had no claim against the trustee if he disregarded their lien and subsequently paid something to the beneficiary directly.[16] The reason for this is that the beneficiary has no interest capable of assignment until the trustee actually exercises his discretion and pays something over to the beneficiary. If, however, the beneficiary had owned an interest that equity would have enforced, the creditors could have reached that equitable interest.[17] Many authorities express the opinion that while a judgment creditor should not be able to reach a discretionary trust fund, he should be able to require that if the trustee decides to pay anything out, he should pay the creditor before he pays the beneficiary.[18] On these grounds the beneficiary would have an interest which is merely contingent upon exercise of discretion by the trustee.[19]

The second basis for disallowing the trust income to be reached by the creditors, and the one of primary concern in the *Harrison* case, was an implied restriction against alienation of the trust income. In discussing the validity of a restraint on the alienation of equitable interests in property, the court cited the Mississippi "donee statute"[20] as fixing a limit "within which restraints against alienation may lawfully be imposed."[21] But since the case involved an active trust, as distinguished from a dry or passive trust,[22] there was no equitable interest belonging to the judgment debtor. Even though the court stated that the income from the trust could be restrained against alienation under the two donee statute, the court in point of fact treated the trust as a spendthrift trust; so there was really no necessity to consider the question of a restraint on alienation, since spendthrift trusts are commonly treated as outside the reach of creditors.[23] Therefore, whether or not an equitable life estate could be subject to a direct restraint on alienation was purely dictum. On the basis of this dictum,

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[16]*Id.* at 936.

[17]See Miss. Code Ann. § 849 (1956).

[18]*E.g.*, Restatement (Second), Trust § 155(2) (1957).

[19]See 2 Scott, Trusts § 155.1 (2d ed. 1956).

[20]Miss. Code Ann. § 838 (1956).

[21]Leigh v. Harrison, 69 Miss. 923, 935, 11 So. 604, 606 (1892).

[22]*Id.* at 930.

[23]See Restatement (Second), Trust § 155(1) (1957).

the Mississippi Supreme Court has consistently upheld direct restraints, whether forfeiture or disabling, on legal and equitable life estates.[24]

IV. Restraints on Legal Life Estates

In the 1923 case of *Crawford v. Solomon,* the court considered a provision in a will which attempted to place a disabling restraint on a legal life estate.[25] The testator devised his real property to his wife and two daughters in equal shares for their lives; the wife's interest was to go to the daughters at the wife's death, remainder to the children of the testator's daughters in fee. The testator also provided that the real estate should not be sold during the life of the wife. When the property failed to return an income over the amount needed for the property taxes, the wife and two daughters filed a bill in chancery court seeking the power to sell the property with the stipulation that the proceeds would be invested in more productive property under the same limitations as provided for in the will. The court denied the request and upheld the disabling restraint, although the decision was contrary to the general rule that disabling restraints on legal life estates are not enforceable.[26] The court cited *Leigh v. Harrison* and stated that ". . . under the 'two donee statute' it is competent for a person making a will to limit the right of alienation during the period therein provided for."[27] It should be noted, however, that since the will of the testator did not attempt to tie up the property for the entire period of the two donee statute, but only for the life of the mother, this statement by the court was in fact dictum.

Three years later in *Bratton v. Graham*[28] the court considered a devise to one Bratton

> "to have and hold in fee simple forever . . . [provided] however, that the said G. E. Bratton shall not . . . in any manner dispose of my real estate . . . until . . . 1975. But should said G. E. Bratton die before said date, then this limitation . . . shall be null and void, and the aforesaid property shall vest . . . in fee simple to the wife and heirs of the body of G. E. Bratton. . . . Should any of the limitations . . . be violated . . . then my real property [is to] descend . . . [by] descent and distribution."[29]

Even though the devise stated that Bratton was to receive the property "in fee simple forever," the court considered that overall intent of the testator was to give Bratton only a life estate which would become a fee simple estate if Bratton lived until 1975. Once determining that

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[24]*E.g.*, Crawford v. Solomon, 131 Miss. 792, 95 So. 686 (1923).

[25]131 Miss. 792, 95 So. 686 (1923).

[26]See *Id.* at 802, 95 So. at 688.

[27]*Id.* at 801, 95 So. at 687.

[28]146 Miss. 246, 111 So. 353 (1927).

[29]*Id.* at 250-51, 111 So. at 353-54.

Bratton received only a life estate and not fee simple title, it was an easy step for the court to uphold the restraint against alienation of the life estate under authority of *Leigh v. Harrison*[30] and *Crawford v. Solomon*.[31]

A second question arose in the *Bratton* case which frequently arises in direct restraint cases. The property of Graham had been sold at an execution sale and the heirs of the testator contended that this involuntary alienation enabled them to invoke the forfeiture clause of the testator's will which provided that they should receive the property "should any of the limitations be violated." Did this involuntary transfer violate the restriction against alienation? The term "alienation" is a broad one which embraces a variety of transfers.[32] Thus, it includes inter vivos transfers as well as testamentary transfers. It includes involuntary as well as voluntary transfers. In many cases, as in the present one, a problem of construction may arise in determining whether the restraint was intended to include all types of alienation or only a particular type. It has been held that a restraint prohibiting a "sale" would not prevent an involuntary transfer.[33] The court in the *Bratton* case construed the restriction strictly and held that the words, "shall not dispose of the property," did not apply to an involuntary transfer.[34] Therefore, the forfeiture restraint, though valid, was held not to have been violated.

Another forfeiture clause restraining alienation of a life estate was upheld in the case of *Russell v. Federal Land Bank*.[35] Two brothers, together with a third brother, held an undivided fee simple interest in property. They conveyed their interest to the third brother ". . . for life, remainder to his heirs in fee . . ." and stipulated in the deed that the third brother ". . . is to have no right power, or authority to sell, mortgage or otherwise encumber said lands or any part thereof . . . and in the event any of these restrictions be disregarded then the . . . [brother] shall forfeit all his estate in all of the said lands . . . and the said lands shall descend to his legal heirs. . . ."[36] The third brother later gave appellee a deed of trust on the property and appellee brought action to quiet title to the land. The court again relied on the "two donee statute" and the *Bratton* and *Leigh* cases in allowing the restraint on the life estate, stating: "In this state it has often been held that it is permissible for a person to impose restrictions on alienation during the period of life of not exceeding two persons."[37] It is interesting to note that the restraint imposed upon Russell was a "forfeiture restraint,"

[30] 69 Miss. 923, 11 So. 604 (1892).
[31] 131 Miss. 792, 95 So. 686 (1923).
[32] SIMES & SMITH, *op. cit. supra* note 1, § 1140.
[33] *E.g.*, Henderson v. Harness, 176 Ill. 302, 52 N.E. 68 (1898).
[34] Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927).
[35] 180 Miss. 55, 176 So. 737 (1937).
[36] *Id.* at 67-68, 176 So. at 738.
[37] *Id.* at 75, 176 So. at 741.

which provided that the land was to go over to Russell's heirs if he attempted to alienate it. The court, however, ignored the forfeiture clause and dealt with the restraint as if it were a disabling restraint. When a life estate with a limitation over to the heirs of the life tenant is created in a jurisdiction which recognizes the Rule in Shelley's Case, a fee would be created in the person designated as life tenant, and the restraint imposed upon a fee would likely be void.[38]

As has been indicated it is apparent that the Mississippi court has consistently upheld forfeiture and disabling restraints on both legal and equitable life estates. By the great weight of authority throughout the country only forfeiture restraints on legal life estates are upheld, and disabling restraints are considered void.[39] There is good reason for drawing a distinction between forfeiture and disabling restraints when applying them to legal life estates. Disabling restraints are more obnoxious to public policy when imposed upon legal interests than are forfeiture restraints. There is a likelihood that creditors will rely upon the ownership of the legal life tenant, who is usually in possession.[40] While both forfeiture and disabling restraints upon legal life estates might sometime mislead a creditor who is unaware of the restraint on his debtor's property, when a forfeiture restraint is involved the risk of loss of the property will usually induce the life tenant to pay his debt if possible. In contrast to the forfeiture restraint, a disabling restraint, if upheld, would bring about the undesirable legal sanctioning of a debtor enjoying the benefits of substantial property interests while simultaneously refusing to pay his just debts. It is of less importance to distinguish the two types of restraints when applying them to equitable interests, for generally the purpose of such restraints on equitable interests is to provide the grantee with a means of support.[41] Since the owner of an equitable interest is normally not in possession, as is the owner of the legal estate, there is less likelihood that creditors will be misled. The federal district courts in Mississippi, however, have carefully recognized the distinction between the two types of restraints when applied to legal life estates, and have refused to allow a disabling restraint upon a legal life estate. In *West Tennessee Co. v. Townes*,[42] the grantor conveyed land to Townes and his wife for their lives and to the survivor of them for life, remainder to the heirs of their bodies, and in default of such heirs to the heirs of the grantor. The

[38]See, *e.g.*, Brenig v. Smith, 267 Pa. 207, 110 Atl. 285 (1920).

[39]See, *e.g.*, Randolph v. Wilkinson, 294 Ill. 508, 128 N.E. 525 (1920); Thompson v. Murphy, 10 Ind. App. 464, 37 N.E. 1094 (1894); McCormick Harvesting Machine Co. v. Gates, 75 Iowa 343, 39 N.W. 657 (1888); Sternberger v. Glenn, 175 Tenn. 644, 137 S.W.2d 269 (1940).

[40]See 6 AMERICAN LAW OF PROPERTY § 26.49 (Casner ed. 1952).

[41]See, *e.g.*, Bowlin v. Citizens Bank and Trust Co., 13 Ark. 97, 198 S.W. 288 (1917).

[42]52 F.2d 764 (N.D. Miss. 1931).

deed to the grantees contained a provision that "said premises shall not be encumbered by said parties . . . and shall not be liable for the debts of said parties. . . ." There was no provision for a forfeiture of the land if it was encumbered by the grantees. The grantees later executed a deed of trust on the land and it was sold at a foreclosure sale. The heirs of the grantees claimed, among other things, that the deed of trust was void due to the restriction against encumbering the property. In speaking of the restraint the court said:

> . . . [I]t contains a provision absolutely restraining the alienation of a legal estate and seeking to put it beyond the reach of creditors. There is no limitation over or reversion in case of an attempted alienation, but only a provision that the life tenants shall not alienate and that creditors cannot get hold of it. The restriction is void, as the right to convey and liability for debts are incidents of property. . . . Simply because the donor might have accomplished his apparent purpose in a legal way, either by a spendthrift trust or a reversionary clause, it is not sufficient justification for the court to rewrite an instrument conveying a legal estate which contains a void provision restraining alienation. . . .[43]

Even though the general policy of the law favors freedom of alienation, the courts have found that some restraints on life estates can have beneficial results. This proclivity to uphold some restraints on life estates is reinforced by the fact that a life estate is not readily marketable anyway.[44] The restraint can operate to protect the interest of the reversioner or remainderman against waste by keeping the life estate in the hands of the life tenant whom the conveyor believes will respect the remainder or reversionary interest. Since a life estate is commonly given for the purpose of providing the life tenant with a means of support, the purpose can be carried out by a forfeiture restraint which will induce retention of the land by the life tenant.[45] To uphold disabling restraints on legal life estates, however, is considered by most jurisdictions to be entirely against public policy since it completely and unreservedly blocks the alienability of the property.[46]

IV. Restraints Upon a Fee

In 1937 the Mississippi Supreme Court used language in the *Russell* case which has been cited by the *American Law of Property*[47] and Professor Simes[48] as favoring a disabling restraint upon a fee sim-

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[43]*Id.* at 766.

[44]See 6 American Law of Property § 26.48 (Casner ed. 1952).

[45]*Ibid.*

[46]*Ibid.*

[47]6 American Law of Property § 26.17 (Casner ed. 1952).

[48]Simes & Smith, *op. cit. supra* note 1, § 1143, n.58.

ple for a limited period of time. The language used by the court which would seem to allow a fee to be restrained under the "two donee statute" is:

> The restraints involved are different from a general restraint on alienation, where property is deeded to another with conditions creating a perpetuity, or disposing of property with restraints longer than two lives in being. Restraints for a limited period as allowed by the law are not hurtful to society, but, on the contrary enable a person to provide for his family, who may be incompetent and incapable of dealing with competition in life.
>
> The law gives persons the right to dispose of their own property with restraints on alienation for a limited period, but denies perpetuities or restraint for a period longer than two lives in being.[49]

Nineteen years after the court implied in the *Russell* case that a reasonable restraint could be imposed on a fee simple, the case of *Martin v. Eslick*[50] provided the court with the opportunity to make certain and unquestionable its position on restraints upon a fee simple; however, the validity of such restraints was still uncertain in Mississippi after the court rendered its decision. Martin's mother willed him a one-fourth interest in her plantation, and said in her will, "It is to be understood, that he does not convey it in any manner, away from my blood. . . ."[51] Martin devised the land to his widow. The heirs of Martin's mother brought an action for the construction of the mother's will, claiming that the limitation in the will restricting conveyance to anyone "away from my blood," reduced the interest devised to Martin to a life estate, with remainder to the heirs of the mother as of the date of her death. The mother's will made no provision for the disposition of the property in the event the son violated the restriction in his lifetime. In holding in favor of Martin's widow, the court employed two independent lines of reasoning to support its finding. First, the court said the restraining clause restricting alienation "away from my blood" was not of sufficient clarity and certainty to reduce the fee simple title to a life estate;[52] and regardless of the validity or invalidity of the restraint on the fee simple title it was not violated since no "conveyance" was made by Martin in violation of the restraining clause.[53] The court construed the restraining clause strictly as it did in the *Bratton* case[54] and said a restraint upon alienation by "con-

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[49]Russell v. Federal Land Bank, 180 Miss. 55, 77, 176 So. 737, 742 (1937).

[50]229 Miss. 234, 90 So. 2d 635 (1956).

[51]*Id.* at 247, 90 So. 2d at 638.

[52]*Id.* at 258, 90 So. 2d at 644.

[53]*Ibid.*

[54]Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927).

veyance" would not include a devise. Since the restraint, even if valid, was not violated the court did not rule on its validity in this part of its opinion. In the second line of reasoning employed by the court in finding for Martin's widow, the validity of the restraint was discussed. The court pointed out that the devise contained no forfeiture clause which provided for a reversion or limitation over in the event Martin violated the restriction.[55] It was said by the court that the absence of such a forfeiture provision made nugatory the restraint on alienation.[56] To support this line of reasoning, in contrast to past cases, the court cited *Bratton v. Graham*[57] as a case which upheld a restraint on alienation because it contained a forfeiture clause. It is submitted, however, that the forfeiture clause in the *Bratton* case had no bearing on the court's decision to uphold the restraint on alienation. In that case the court first decided that the general intent of the testator was to give the grantee only a life estate. Once that decision was made, the court merely upheld the restraint on the life estate by authority of the "two donee statute" and the dictum in *Leigh v. Harrison*.[58] Nowhere in the opinion of the *Bratton* case is there a statement that it was the forfeiture clause which influenced the court in either reducing the devise to a life estate or in upholding the restraint. The court in the *Martin* case, therefore, voided the restraint because it contained no forfeiture provision, and not because it was upon a fee simple title. It is submitted that even though the court was mistaken in its analysis of the *Bratton* case, and historically the Mississippi Supreme Court has seen no necessity in requiring a forfeiture clause to secure obedience of a prohibition to alienation of legal estates,[59] such a requirement is desirable[60] and the end result of the *Martin* case is a step in the right direction.

Any possible implications that the *Russell* case might have raised in its sweeping language, apparently favoring restraints on the alienation of a fee under the "two donee statute," were laid to rest in *Dukes v. Crumpton*.[61] In that case the grantor conveyed a fee simple title, but stated in the deed that the ". . . grantor or his successor reserves all rights of sale. . . ."[62] The court held that the restraint was repugnant to the granting clause, and stated that "the right of alienation is an indispensable incident to an estate in fee."[63] It is generally recognized

[55]Martin v. Eslick, 229 Miss. 234, 258, 90 So. 2d 635, 644 (1956).
[56]*Ibid.*
[57]146 Miss. 246, 111 So. 353 (1927).
[58]69 Miss. 923, 11 So. 604 (1892).
[59]See, *e.g.*, Ford v. Smith, 162 Miss. 138, 137 So. 482 (1931).
[60]See, *e.g.*, 6 AMERICAN LAW OF PROPERTY § 26.50 (Casner ed. 1952).
[61]233 Miss. 611, 103 So. 2d 385 (1958).
[62]*Id.* at 616, 103 So. 2d at 385.
[63]*Id.* at 629, 103 So. 2d at 388.

that a fee simple estate cannot be restrained against alienation by any type of restraint.[64]

V. Conclusion

The courts, including those of Mississippi, have gone far in effectuating a conveyor's purpose to provide support for an imprudent conveyee by upholding even disabling restraints on equitable life estates.[65] This equitable doctrine, usually termed the "spendthrift trust" doctrine, is followed in nearly all jurisdictions.[66]

Although the Mississippi court has upheld both forfeiture and disabling restraints when applied to legal life estates,[67] by the great weight of authority a disabling restraint upon a legal life estate is void.[68] If a 1931 decision is followed, the federal district courts in Mississippi would follow the majority rule and require a forfeiture clause in a restraint upon a legal life estate if the restraint is to be upheld;[69] and a more recent decision of the Mississippi Supreme Court would now also seem to require a forfeiture clause in such a restraint.[70] Such a requirement would be a desirable change in the law of direct restraints in Mississippi due to the obnoxiousness of disabling restraints in completely suspending the power of alienation when directed against both voluntary and involuntary transfers, and in permitting a debtor to remain in undisturbed enjoyment of his property while denying his creditors satisfaction of their just claims.

In Mississippi,[71] as in the vast majority of states,[72] any direct restraint upon the alienation of a fee is void. Much can be said, however, for a policy favorable to the validity of forfeiture restraints of limited duration of a fee, such as that adopted by Kentucky.[73] A restraint for a reasonable number of years[74] or a restraint until the grantee reaches the age of twenty-one[75] might, as a matter of public policy, serve useful purposes. The grantee can be protected until he reaches a more mature age. When alienation is allowed within the period of restraint with the grantor's consent, the restriction can protect

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[64]See, *e.g.*, 6 American Law of Property § 26.94 (Casner ed. 1952).

[65]See, *e.g.*, Leigh v. Harrison, 69 Miss. 923, 11 So. 604 (1892).

[66]See 6 American Law of Property § 26.94 (Casner ed. 1952).

[67]*E.g.*, Crawford v. Solomon, 131 Miss. 792, 95 So. 686 (1923).

[68]See, *e.g.*, Randolph v. Wilkinson, 294 Ill. 508, 128 N.E. 525 (1920).

[69]West Tenn. Co. v. Townes, 52 F.2d 764 (N.D. Miss. 1931).

[70]Martin v. Eslick, 229 Miss. 234, 90 So. 2d 635 (1956).

[71]Dukes v. Crumpton, 233 Miss. 611, 103 So. 2d 385 (1958).

[72]See 6 American Law of Property § 26.50 (Casner ed. 1952).

[73]See Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 3, 88 (1960).

[74]Auxier's Ex'x v. Theobald, 255 Ky. 583, 75 S.W.2d 39 (1934).

[75]Howard's Adm'x v. Asher Coal Mining Co., 215 Ky. 88, 284 S.W. 419 (1926).

a subdivider of property against undesirable persons buying in the subdivision prior to the sale of all the lots and enhance recoupment of his investment. A direct forfeiture restraint on a fee for a limited period would also allow property to be left to an imprudent child in fee with an assurance of support until it reaches maturity without resorting to a trust which might consume a large portion of a smaller estate's income by payment of the trust fees. Neither would these forfeiture restraints suspend the power of alienation of the property, since the grantor or person to receive the limitation over in case of violation of the restraint could join in with the conveyee and sell a fee simple title if such was desired.[76]

The rules on direct restraints on alienation have evolved from a balancing by the courts of the beneficial purposes of restraints against the policy of favoring free alienation of property. The purposes served by the restraints play an important factor in determining the rules.[77] As new purposes for direct restraints arise which are in accord with public policy, it is anticipated that the courts will attempt to modify some of the old doctrines to promote the beneficial aspects which can be realized in a complex society by certain types of direct restraints.[78]

Neal B. Biggers, Jr.

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[76]See Dukeminier, *supra* note 73, at 89.

[77]See SIMES & SMITH, *op. cit. supra* note 1, § 1168.

[78]*Ibid.*

RECENT DECISIONS

Constitutional Law—Solicitation Statute—Applied to NAACP Activities

In attempting to achieve public school desegregation in Virginia, the NAACP, acting through members of the staff of its local branch, explained to meetings of parents and children the legal steps necessary to achieve desegregation. Printed and blank forms were provided which, when signed by parents, authorized NAACP attorneys or attorneys designated by the NAACP to represent the prospective litigants in proceedings designed to achieve desegregation. It was decided by the state court that such activity violated the state statute's prohibition against improper solicitation of legal business.[1] Held: Reversed. These activities of the NAACP and its legal staff are modes of expression and association protected by the first and fourteenth amendments which a state may not prohibit under its power to regulate solicitation of business by the legal profession. *NAACP v. Button*, 83 Sup. Ct. 328 (1963).

Solicitation of legal business, condemned for various reasons,[2] has long been held improper by the American courts.[3] It has been said that this prohibition distinguishes the profession from a business.[4] But, while solicitation is generally prohibited by the Canons of Professional Ethics,[5] it has plainly been condoned in some cases where the courts have determined the result to be in the public interest.[6] While most courts have been reluctant to define solicitation, it has been propounded that the recommendation of an attorney upon inquiry by a third party does not constitute solicitation since the idea of the need for the attorney must originate with the party doing the soliciting.[7] The soliciting party must also perform some overt act designed to bring about the employment so solicited.[8] One of the more abhorrent results of solicitation by lawyers is the pecuniary gain which may inure to the benefit of the unethical.[9] Therefore, where a local bar association offered its legal services free of charge to persons who had been wronged by a usurious moneylender it was held that the state statute prohibiting solicitation of legal employment was not violated.[10] If the circumstances are that no monetary reward is obtained by a person soliciting legal business and the solicitation actually results in a benefit to society, the courts may find that such conduct is permissible.

In the case at bar, however, the attorneys performing the acts in

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[1] Va. Code Ann. §§ 54-78 (1958).

[2] See Comment, 7 Vand. L. Rev. 677, 684 (1954).

[3] See, *e.g.*, People v. MacCabe, 18 Colo. 186, 32 Pac. 280 (1893).

[4] See, *e.g.*, *In re* Cohen, 261 Mass. 484, 159 N.E. 495 (1928).

[5] See ABA, Cannons of Professional and Judicial Ethics, Cannon 27 (1957).

[6] See Comment, 25 U. of Ch. L. Rev. 674, 678 (1958).

[7] People v. Levy, 8 Cal. App. 2d 763, 50 P.2d 509 (Super. Ct. 1935).

[8] *Ibid.*

[9] See, *e.g.*, People *ex rel.* Chicago Bar Ass'n v. Edelson, 313 Ill. 601, 145 N.E. 246 (1924), where motive of the attorney to merely secure fees was said to be determinative of the unprofessional nature of the conduct.

[10] Gunnels v. Atlanta Bar Ass'n, 191 Ga. 366, 12 S.E.2d 602 (1940).

question were paid a salary for their services.[11] The court reasoned, however, that the relatively small amount of compensation received by the attorneys could not be the motivating force behind the organizational activities.[12] Thus it was held that one of the major reasons for prohibiting solicitation was absent. The state statute, which prohibited solicitation by "running" or "capping," was amended in 1956 to include in the definition of "runner" or "capper" an agent who retains an attorney for a person or organization in connection with judicial proceedings to which it "is not a party and in which it has no pecuniary right or liability."[13] It was not contended in this case that the statute[14] was applied discriminatingly, but rather that the statute was unconstitutional as construed and applied to the association's activities. In an earlier case it was held that "association for the advancements of beliefs and ideas" was protected by the first and fourteenth amendments.[15] It has also been said that statutes which set out to restrict these freedoms should contain sufficient "breathing space" to allow survival of the freedoms.[16]

It was also stated in the case at bar that the Virginia statute was designed specifically to retard attempts to desegregate public schools.[17] In the concurring opinion it is emphatically stated that such statutes are discriminatory per se.[18]

Since the Court previously has expressed clearly its disdain for broadly written rules which restrict freedom of expression,[19] the holding in this case is not altogether surprising once it is conceded that the questionable activities of the organization are protected by the first and fourteenth amendments.

There were statutes passed in Mississippi in 1956 which may now be suspect.[20] The district court refused to find the statutes unconstitutional in the only case in which the issue was raised, but it is noted that there was no attempt made by the state to enforce the prohibition.[21] It is now possible that where the state attempts to apply the 1956 statutes so as to prevent the NAACP from soliciting prospective litigants in desegregation proceedings the Court will hold that the statutes unduly inhibit protected freedoms of expression and association.[22]

William Thad Cochran

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[11]See NAACP v. Button, 83 Sup. Ct. 328, 350 (1963).

[12]*Id.* at 343.

[13]Va. Code Ann. §§ 54-74, 54-78, 54-79 (1958).

[14]Va. Code Ann. § 54-78 (1958).

[15]NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958). See also DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

[16]See Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[17]See NAACP v. Button, 83 Sup. Ct. 328, 344 (1963) (concurring opinion).

[18]*Ibid.*

[19]See, *e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

[20]See Miss. Code Ann. §§ 2049-01 to 08 (1950). See also Miss. Code Ann. §§ 8665, 8683, 8684 (1956).

[21]See Darby v. Daniel, 168 F. Supp. 170 (S.D. Miss. 1958).

[22]The statute in issue in the noted case was also struck down for reason of vagueness; see NAACP v. Button, 83 Sup. Ct. 328, 338-39; and it is possible that the Mississippi statutes may be subject to the same objection.

EMINENT DOMAIN—TAKING OF EXECUTORY INTERESTS—COMPENSATION

A husband, holding land under a will which devised to him a fee simple defeasible with a life estate to the wife if she survived him, followed by a gift over to complainants on the wife's death or remarriage, conveyed land to the State Highway Commission. The wife joined in the conveyance. Complainants claim that they are entitled to compensation for their executory interest under the constitutional provisions requiring compensation for property taken for public use. Trial court held complainants' interest was not compensable. HELD: Reversed and remanded. The owners of an executory interest contingent on an event, or events, not certain to occur have, nevertheless, property protected by section 17 of the Mississippi constitution, and therefore such interest is compensable. *State Highway Commission v. Hemphill*, 145 So. 2d 455 (Miss. 1962).

It appears that there are three approaches to the problem of determining which future interests are compensable in the law of eminent domain. The majority rule holds that the condemner must compensate for the taking of vested remainders.[1] Contingent remainders after a life estate,[2] or a contingent interest after a term of years[3] are also compensable as are reversions when they follow such estates.[4] Inchoate dower,[5] reversionary interests[6] (*i.e.*, possibility of reverter and right of entry, as used in this note) and contingent interests[7] are not compensable according to the majority rule. Various reasons have been relied upon in denying compensation for the taking of such interests, for example: they are not estates in land but merely expectancies;[8] performance of the condition has become impossible and is therefore excused;[9] and they are too remote, speculative, or contingent to be capable of evaluation.[10] A second approach, advocated by the *Restatement*,[11] extends compensation to holders of a reversionary interest when a breach of the condition is eminent.[12] Finally, what might be termed the minority rule extends compensation much further than either of the preceding rules. The rationale for this rule is ". . . that the right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an 'estate' or 'interest' in the land."[13] Thus compensation is extended to the taking of inchoate dower rights,[14]

[1]See Indiana, I & I R.R. v. Conness, 184 Ill. 178, 56 N.E. 402 (1900).

[2]See Department of Pub. Works v. Porter, 327 Ill. 28, 158 N.E. 366 (1927).

[3]See Stubbs v. United States, 21 F. Supp. 1007 (M.D.N.C. 1938) (dictum).

[4]*Ibid.*

[5]*E.g.*, Flynn v. Flynn, 171 Mass. 312, 50 N.E. 650 (1898).

[6]*E.g.*, Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544 (1878).

[7]See Fifer v. Allen, 228 Ill. 507, 81 N.E. 1105 (1907). See also 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 5.22 (2) (3rd ed. 1950); Stoyles, *Condemnation of Future Interests*, 43 IOWA L. REV. 241, 246, n.26 (1958).

[8]See, *e.g.*, Flynn v. Flynn, 171 Mass. 312, 50 N.E. 650 (1898).

[9]See Romero v. Department of Pub. Works, 17 Cal. 2d 189, 109 P.2d 662 (1941).

[10]See, *e.g.*, United States v. 16 Acres of Land, 47 F. Supp. 603 (D. Mass. 1942).

[11]RESTATEMENT, PROPERTY § 53, Comment *c* (1936).

[12]Chew v. Commonwealth, 400 Pa. 307, 161 A.2d 621 (1960).

[13]United States v. 54¼ Acres of Land, 139 F.2d 244, 247 (2d Cir. 1943).

[14]Wheeler v. Kirtland, 27 N.J. Eq. 534 (Ch. 1875).

reversionary interests,[15] contingent remainders,[16] and, by analogy, executory interests.[17]

In the instant case, Mississippi has adopted the minority rule. There are few decisions on this point in Mississippi. It appears that the court has determined that the holder of a reversion after a term of years is entitled to compensation,[18] but this is in line with the majority rule. The court has, however, been unwilling to nullify legislation affecting dower rights acquired before such legislation,[19] but in the same case, the court, by way of dictum, indicated that dower rights would be protected in the case of judicial sale of the property.[20] Moreover, the court has said that "from the very term 'property' the law infers some value . . ."[21] thus, inferentially at least, accepting the rationale of the minority rule.[22]

Analytically, the result reached in the case at hand is undeniably proper. It is in the practical application of this result that difficulties arise. In the instant case, the court indicates that an immediate apportionment of the proceeds based on actuarial tables would be the proper method of handling the problem,[23] and such an approach would be satisfactory where the interests of the parties are determined by the terms of the instrument creating them.[24] In the noted case, however, such an approach appears to be questionable, to say the least, because the ultimate vesting of the interest in fee depends upon a condition subsequent. In this particular situation the magnum of the interest of each party has not already been fixed finally by the instrument creating the interest. Another method would be to put the condemnation award in trust, paying the interest to the holder of the possessory estate until its termination, then the corpus to the holder of the future interest.[25] Still a third approach would be to reinvest the proceeds in land similar to that condemned and continue the rights of all parties as in the condemned land.[26] It should be recognized that a mechanical rule governing the disposition of proceeds from condemnation will not work satisfactorily in all cases, because there are advantages and disadvantages to each of the three methods listed above. Each case should be disposed of on the basis of what will do justice to all the parties in interest on the particular set of facts involved.

Richard Baxter Wilson, Jr.

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[15]See Terminal Coal Co. v. United States, 172 F.2d 113 (3rd Cir. 1949).

[16]See Charleston & W. C. Ry. v. Reynolds, 68 S.C. 481, 48 S.E. 476 (1904).

[17]*Cf.* Wheeler v. Kirtland, 27 N.J. Eq. 534 (Ch. 1875).

[18]See Board of Levee Comm'rs v. Johnson, 66 Miss. 248, 6 So. 199 (1898).

[19]Magee v. Young, 40 Miss. 164 (1866).

[20]*Id.* at 172.

[21]Illinois Cent. R.R. v. State *ex rel.* Dist. Attorney, 94 Miss. 759, 48 So. 561, 562 (1909).

[22]See note 15 *supra* and accompanying text.

[23]145 So. 2d 455, 464 (Miss. 1962).

[24]See United States *ex rel.* TVA v. Spiceland, 52 F. Supp. 40 (W.D. Ky. 1943).

[25]See, *e.g.*, *In re* Cropsey Ave., 268 N.Y. 183, 197 N.E. 189 (1935).

[26]See United States v. 380 Acres of Land, 47 F. Supp. 6 (W.D. Ky. 1942).

TORTS—ACTION BY WIFE AGAINST HUSBAND FOR PERSONAL INJURIES

Plaintiff brought an action against her husband for assault and battery. The complaint charged that the husband beat upon, scratched and abused the person of the plaintiff with the result that the plaintiff received a broken arm, other physical injuries and suffered from emotional distress. The lower court granted a summary judgment for defendant on the ground that a wife cannot sue a husband for tort in California. HELD: Reversed. The rule of interspousal immunity for intentional torts is abandoned; one spouse may sue the other in tort where the tort is intentional. *Self v. Self,* 376 P.2d 65 (Cal. 1962).

An action by a wife against her husband for a broken leg which she allegedly suffered as a result of his negligence. The complaint stated two causes of action. First, that plaintiff, while walking on the deck of her husband's pleasure boat, fell and broke her leg as a proximate result of the defendant's negligence. Second, knowing that plaintiff would walk upon the deck in question, defendant failed to warn her of the slippery and unsafe condition of which he had knowledge. The lower court ruled that one spouse may not sue the other in California for a personal tort. HELD: Reversed. The rule of interspousal immunity for personal torts which involve negligence is abandoned; one spouse is liable for negligent tort causing injury to the other spouse. *Klein v. Klein,* 376 P.2d 70 (Cal. 1962).

The common law regarded the husband and wife as a single legal entity with the result that one spouse could not maintain any tort action against the other.[1] Married Women's Acts were adopted in the nineteenth century with the intent of fully emancipating the wife and securing to her a separate legal identity.[2] The courts generally agree that these statutes enable the wife to maintain an action against the husband for any tort against her property interest.[3] However, a majority of jurisdictions, supported by a landmark decision of the Supreme Court,[4] have refused to construe the statutes in abrogation of the common law view for personal torts.[5] Aside from statutory interpretation,[6] the chief reasons given by these courts for denying the action are that a personal tort suit between husband and wife would disrupt the harmony and tranquility of the home,[7] encourage trivial litigation or promote fictitious and fraudulent claims;[8] and that adequate remedy is available in divorce and criminal actions.[9] Mississippi is representative of the majority view in that it relies on several of the above stated reasons.[10]

A strong minority of jurisdictions permits one spouse to maintain a

[1]See PROSSER, LAW OF TORTS § 101 (2d ed. 1955).

[2]*E.g.*, MISS. CODE ANN. § 451-56 (1956).

[3]See 3 VERNIER, AMERICAN FAMILY LAWS § 180 (1935).

[4]Thompson v. Thompson, 218 U.S. 611 (1910).

[5]Annot., 43 A.L.R.2d 632 (1955).

[6]*E.g.*, Thompson v. Thompson, 218 U.S. 611 (1910).

[7]*E.g.*, Corren v. Corren, 47 So. 2d 774 (Fla. 1950).

[8]*E.g.*, McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).

[9]*E.g.*, Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920).

[10]*E.g.*, Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924).

personal tort action against the other.[11] California, by the instant opinions, has joined the growing minority in construing the married women's acts to permit such an action, whether it is intentional or negligent in character.[12] The minority view rejects the principal argument of disrupting the domestic peace as lacking in substance, for the reasons that there is little tranquility left to be disturbed in the case of a wilful tort and that it is inconsistent to allow an action for a broken promise and not for a broken arm.[13] The argument of trivial litigation is disputed by the absence of a surge of such actions in jurisdictions where interspousal tort suits are permitted and by the availability of the defense of consent and assumption of risk.[14] The danger of fraud and collusion has been recognized, but the minority view asserts that this factor is present in many cases and that a cause of action should not be denied because of this danger.[15] Inasmuch as criminal courts do not provide compensation for the damages done and do not include all torts which might be committed, it has been argued that adequate legal remedy is not provided by them for the injured spouse.[16]

The California court seems to be responsive to modern social policy and in accord with the policy of the Married Women's Acts. The common law theory of husband and wife as a legal entity has become an illusory concept. Modern legal writers unanimously agree that the reasoning of the majority rule is not supported by fact. The number of jurisdictions adopting the minority view has been increasing in recent years. Thus, the instant opinions appear to represent a growing trend in favor of allowing personal tort actions between spouses, which has, no doubt, been accelerated by the increased importance of liability insurance in recent years.

Charles Ray Davis

Trade Regulations—Good Faith Defense Under Robinson-Patman Act—Gasoline Price Wars

Sun Oil Company was the sole supplier of an independently owned retail station in a sales territory composed of eight Sun stations. Super Test Oil Company, which operated about sixty-five retail service stations, opened a station diagonally across the street from McLean (Sun's retailer) and sporadically reduced its price of regular gasoline to the consumer. There was a resulting decrease in the volume of McLean's sales. After resisting repeated requests from McLean for a price concession over a period of about four months, Sun gave McLean a discount without immediately reducing the price to other Sun dealers in the sales territory. Several of these other dealers testified that their sales declined and that many of their former customers were seen buying gasoline from McLean. An equal discount was later granted to the other dealers when a general price war developed in the Jacksonville area.

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[11] See 27 Am. Jur. *Husband and Wife* § 593 (1954).

[12] Klein v. Klein, 376 P.2d 70 (1962).

[13] *E.g.*, Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914).

[14] *E.g.*, Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).

[15] *E.g.*, Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938).

[16] See, *e.g.*, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).

The Federal Trade Commission alleged violation of section 2(a) of the Robinson-Patman Amendment to the Clayton Act.[1] A cease and desist order was issued when the Commission overruled the "good faith meeting of an equally low price of a competitor" defense,[2] holding that this defense was not available where the reduction was to enable the price cutter's purchaser to meet competition. The Court of Appeals for the Fifth Circuit set aside the order, holding that the defense was available to Sun. HELD: Reversed. The price contemplated by the act which may be met by one who would discriminate must be the lower price of his own competitor and is not available to a gasoline supplier in response to a price reduction by a competitor of the supplier's purchaser. *FTC v. Sun Oil Company*, 83 Sup. Ct. 358 (1963).

The Sherman Act of 1890 was designed to prevent all monopoly and to maintain a competitive economy.[3] The Clayton Act twenty-five years later limited the form that competition could take and condemned specified practices which Congress deemed conducive to monopoly.[4] With the appearance of the large grocery chain stores in the early thirties, there was growing dissatisfaction on the part of independent wholesale and retail grocers with the protection afforded by the anti-monopoly statutes. As judicially interpreted, the Clayton Act "placed no limit upon differentials permissible on account of difference in quantity; [and] it was understood to permit all discriminatory price differences made to meet competition . . . ."[5] The large discounts made available to the chain stores by mass-purchasing, and the resulting lower prices, threatened the independent grocer with extinction. The aim of the Robinson-Patman Amendment to the Clayton Act, sponsored by the Wholesale Grocer's Association, was to limit the advantage gained by the quantity discount.[6] Section 2(a) of the amended act prohibits any form of discrimination where the effect may be to "substantially lessen, injure or destroy competition."[7] In addition to clarifying the provisions of the Clayton Act, the prohibition was extended to cover the buyer recipients and criminal sanctions were added.

At least one observer has detected a cycle in the enforcement of the Robinson-Patman Act,[8] which may be demonstrated by examining the status of the various defenses under the act. A prima facie case of discrimination may be rebutted by showing that (1) competition was not harmed, (2) the difference was justified by savings in costs, or (3) the reduction was made in good faith to meet the equally low price of a competitor.[9] In the early years of the amendment, interpretation and enforcement was conservative with the FTC required to furnish

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[1] 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958), amending 38 Stat. 730 (1914).

[2] 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958).

[3] 26 Stat. 209 (1890), 15 U.S.C. §§ 1-3 (1958); see WILCOX, PUBLIC POLICIES TOWARD BUSINESS 60 (rev. ed. 1960).

[4] 38 Stat. 730 (1914); see also NEW YORK BAR ASS'N, ROBINSON-PATMAN ACT SYMPOSIUM 8 (1946).

[5] NEW YORK BAR ASS'N, ROBINSON-PATMAN ACT SYMPOSIUM 10 (1946).

[6] See generally FTC v. Morton Salt Co., 334 U.S. 37 (1948).

[7] 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

[8] See generally Rowe, *Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COL. L. REV. 1059 (1956).

[9] *Id.* at 1074.

proof of injury to competition,[10] and suits being dismissed where the cost defense[11] or the good faith defense were presented.[12] With the end of World War II, the Commission was more strict in enforcing the provision of the act, requiring such degree of proof as to all but destroy the cost defense.[13] In *Corn Products Refining Co. v. F.T.C.*, the Commission was no longer required to prove injury to competition once a discriminatory price was demonstrated.[14] In the early stages of the *Standard Oil* litigation, the Commission argued that the good faith defense merely shifted the burden of proving injury but did not constitute an absolute defense.[15] This trend toward limitation of the good faith defense was reversed when the Supreme Court ruled that this defense was substantive in nature and could not be defeated by a proof of injury to competition.[16] In 1952, another decision required the Commission to show substantial injury to competition and not merely a price discrimination to make out a prima facie violation.[17] In the noted case, the Court has limited, or at least clarified, the scope of the good faith defense by adopting a strict interpretation of the "equally low price of a competitor."[18] The Court of Appeals for the Fifth Circuit considered Super Test to be an integrated supplier-retailer and allowed the defense reasoning that the competitive structure of the gasoline industry was such that competition occurs primarily at the consumer level, and that it would be unrealistic to expect a directly competing offer to have been made to McLean.[19] Sun also argued that the defense should be available where it was faced with the loss of a customer if the reduction was not granted.[20] The Supreme Court stated that Sun had not proved that Super Test was vertically integrated and held that the defense had not been proven.[21]

The effect of the instant decision seems to be to render illegal the form of price war in which a major oil company reduces the price to its retailers to meet the competition of an independent operator. The Court was understandably reluctant to extend the scope of the good faith defense to cover this factual situation since to do so would have amounted to a return to the overly broad "meeting of competition" defense under the Clayton Act,[22] which was limited by the Robinson-Patman Act to protect only "discrimination made to meet an equally low price of a competitor."[23] A separate concurring opinion questions

[10]Kraft-Phoenix Cheese Corp., 25 F.T.C. 537 (1937).

[11]Bird & Son, Inc., 25 F.T.C. 548 (1937).

[12]Shefford Cheese Co., 25 F.T.C. 1209 (1937).

[13]See Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 21-23 (1956).

[14]144 F.2d 211 (7th Cir. 1944), *aff'd* 324 U.S. 726 (1945).

[15]Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949).

[16]Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

[17]Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

[18]FTC v. Sun Oil Co., 83 Sup. Ct. 358 (1963).

[19]*Id.* at 362.

[20]*Ibid.*

[21]*Id.* at 363.

[22]See *Id.* at 365.

[23]*Id.* at 366.

the wisdom of making a final determination of the case without remanding to allow Sun to prove that Super Test was vertically integrated.[24] Such treatment of the matter is probably not so objectionable as it might first appear when one considers the limited scope of the cease and desist order.[25] Since the sole legal question in controversy has been resolved and no monetary damages have been assessed against Sun, further proceedings seem unnecessary. What then are the alternatives available to the major oil company? Sun recognizes that it may reduce its price uniformly to competing purchasers but urges that this would serve to spread a price war over an unnecessarily wide geographic area. The Commission asserts that a subsidy to the retailer serves to increase the severity and duration of a price war. The Court observed that while allowance of the price cut here might produce temporary price flexibility, the overall effect would be to encourage a long-range price rigidity.[26] Being unwilling to commit itself to this broad discount approach, Sun says that the only realistic course left open to it is further vertical integration but recognizes that to do so would involve the elimination of the very persons the Robinson-Patman Act was intended to protect—the individual station operators. The Court does not recognize this development as inevitable. This wide divergence of opinion serves to demonstrate the complexity of the competitive structure in the market place. While the Court was undeniably correct in the application of this statute, it is submitted that the Robinson-Patman Act, designed to meet a specific situation, establishes an inelastic standard and fails to recognize the multiplicity of economic factors affecting competition.[27]

Fred E. Moss

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[24]*Id.* at 372.

[25]See generally WILCOX, PUBLIC POLICIES TOWARD BUSINESS 121 (rev. ed. 1960).

[26]FTC v. Sun Oil Co., 83 Sup. Ct. 358, 369 (1963).

[27]See Note, 1962 DUKE L.J. 300 (1962).

RECENT BOOKS

PERPETUITIES LAW IN ACTION

Kentucky Case Law and the 1960 Reform Act.

By Jesse Dukeminier, Jr. Lexington: University of Kentucky Press, 1962. Pp. 168. $5.00.

Pells v. Brown[1] determined in 1620 that executory interests were not destructible under the common law rule as to legal contingent remainders, whereby such remainders fell (in the course of actual events) if they did not become vested before the termination of the protecting freehold estate (or estates). Obviously these "new-fangled" devices might greatly defer the ultimate vesting of interests in land since the old common law rule of destructibility did not apply to them. Instead of specifying by legislation the period of time within which vesting of such interest might be deferred, the English resorted to the fortuities of litigation for establishment of the outer limits of this period of deferment. This approach took well over 200 years from 1620.[2] By 1886, Professor John Chipman Gray could state the rule against remoteness of vesting, commonly referred to as the Rule Against Perpetuities, as follows: "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest."[3]

Simultaneous with the evolvement of the Rule Against Perpetuities (hereinafter sometimes referred to simply as the Rule) was the sporadic development of the doctrine or policy as to the application of the Rule. By 1886, Gray could safely report:

> The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not like a rule of construction, a test, more or less artificial, to determine intention. *Its object is to defeat intention.* Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be *remorselessly applied.* (Emphasis added.)[4]

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[1]17 Jac. 1. Roll 44, 79 Eng. Rep. 504.

[2]Goring v. Bickerstaffe, 2 Freeman Ch. 163, 22 Eng. Rep. 1132 (1662), and The Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682), determined that the survivor of identifiable lives in being might measure the period. Long v. Blackall, 7 T. R. 100, 101 Eng. Rep. 875 (1797), settled that an enfant en ventre sa mere was a life in being. Cadell v. Palmer, 1 Cl. & Fin. 372, 6 Eng. Rep. 956 (1833), held that the period of the Rule against Perpetuities might be extended for 21 years, following the lives in being. And after Abbiss v. Burney, 17 Ch. Div. 211 (1881), legal contingent remainders rendered indestructible by the Contingent Remainders Acts of 1845 and 1877 and all equitable contingent remainders were deemed to be governed by the so-called modern Rule against Perpetuities, in England.

[3]GRAY, THE RULE AGAINST PERPETUITIES, § 201 (4th ed. 1942).

[4]*Id.* § 629.

The "glacial force"[5] of the Rule gathers its fearful capacity for destruction from the proposition that whether or not the contingent interest "must vest" is to be determined in the light of remote possibilities of violation of the Rule conjectured as of the time of the creation of the interest, irrespective of how events actually turn out. This approach to the determination of the validity of a contingent interest, under the Rule, is the opposite of the older common law policy of wait-and-see, as applied to legal contingent remainders. It is a matter of history that the "object to defeat" has become a magnificent obsession predicated, frequently, upon surprising and impractical assumptions as to remote possibilities of violation of the Rule. For example, it has been solemnly and judicially concluded or assumed: A testator intended to include after-born children of a woman already over 70 years old;[6] a bequest to *A* for life, to his widow for life, then to his children who survived his widow, might involve for *A* another wife who was not in being when the bequest became effective but who survived as his widow;[7] a bequest for life to Mrs. *G* (67 years old at the effective date of the will), then to her grandchildren living at testator's death (or born within 5 years thereafter) and attaining 21 thereafter, *might* involve an afterborn child of Mrs. *G* and subsequent issue of such afterborn child;[8] a 10-year leasehold to commence in possession within 30 days after the completion of a building (to be erected with diligence) on land involved might not commence in possession within the period of the Rule.[9]

For many decades, English and American courts generally applied the all-or-nothing rule of *Leake v. Robinson*,[10] and uniformly knocked down ultimate interests upon the possibility that some afterborn beneficiary might not attain a specified age within twenty-one years after the last life in being. The law reports in this country, as well as in England, provide an over abundance of such examples of the passion for destruction by the Rule which was developed from the simple premise that a limit should be applied to the deferment or remoteness of vesting.[11] Finally, in 1891, the Supreme Court of New Hampshire turned its attention to *Edgerly v. Barker*,[12] wherein testator left his estate in

[5]Merchants National Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).

[6]Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (1787).

[7]Loring v. Blake, 98 Mass. 253, 259 (1867).

[8]*Re Gaites Will Trust*, [1949] 1 All E.R. 4596.

[9]Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 326 P.2d 957 (Dist. Ct. App. 1958).

[10]2 Mer. 363, 35 Eng. Rep. 979 (1817).

[11]See the following articles by Professor W. B. Leach: *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329 (1938); *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 72 (1952); *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318 (1960).

[12]66 N.H. 434, 31 Atl. 900 (1891).

trust for the benefit of his children for life with principal to his grandchildren "when the youngest . . . shall arrive at the age of forty years." That court held the bequest to the grandchildren valid by resorting to *cy pres* (an established doctrine in the area of charitable trusts) and reducing the age requirement for the youngest grandchild to twenty-one years. Professor Gray's reaction to that disposition was by way of a vigorous criticism in the *Harvard Law Review* in 1895.[13]

Over the ensuing years, there was recurring criticism or complaint as to the tyranny of the Rule in its application, without substantial change until 1947. That year, Pennsylvania adopted legislation which provided that the Rule would be applied in the light of actual events rather than in the prospect of remotely (or even fantastically) possible events.[14] In practical effect, Pennsylvania turned to the wait-and-see procedure in determining violations of the Rule. Through 1960, Massachusetts,[15] Maine,[16] Connecticut,[17] Vermont,[18] Washington,[19] New York,[20] Maryland,[21] and Kentucky[22] have adopted legislation which incorporates wait-and-see and/or *cy pres* in applying the Rule to determine the validity of contingent interests. In addition, New Hampshire took another large step toward judicial reform of the "remorseless" application of the Rule, by way of *Merchants Nat'l Bank v. Curtis* in 1953.[23] There, testatrix bequeathed to her two children in joint tenancy for life; remainder to her only grandchild, Margaret, in fee simple—with any other afterborn grandchildren being allowed to share the remainder, but if any grandchildren of testatrix survive the life tenants and die leaving no issue then the property to go over to other relatives of testatrix. Margaret, as the only grandchild, survived the life tenants and died leaving no issue. To avoid remorselessly applying the Rule the court elected to apply the wait-and-see doctrine and thereby uphold the gift over. By now, one-fifth of our states have effected the general pattern of reform above indicated. Such developments in the last sixteen years reaffirm a desire for limited deferment of vesting (or enjoyment) as to contingent future interests but emphasize the desire for a workable and more realistic application of such a policy.

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[13] 9 HARV. L. REV. 242; See Gray, *op. cit. supra* note 3, Appendix G.
[14] See PA. STAT. ANN. tit. 20 § 301.5 (1950).
[15] MASS. ANN. LAWS, Ch. 184A (1955).
[16] ME. REV. STAT. ANN. Ch. 160, §§ 27-33 (Supp. 1961).
[17] CONN. GEN. STAT. ANN. §§ 45-95 (1958).
[18] VT. STAT. ANN., tit. 27 § 501 (1959).
[19] WASH. REV. CODE §§ 11.98.010-030 (Supp. 1959).
[20] N.Y. Real Prop. § 42 (1945).
[21] MD. ANN. CODE art. 16, § 197A (Supp. 1962).
[22] KY. REV. STAT. §§ 381.215-16 (1962).
[23] 98 N.H. 225, 97 A.2d 207 (1953).

The scholarly and concise volume of Professor Dukeminier is well worth examination by all conveyancers and estate planners—particularly those favorably disposed toward the pattern of reform already pointed out. He has amply demonstrated by Kentucky case law how vigorously that jurisdiction has "remorselessly applied" the common law Rule and/or its "perpetuities statute" to defeat intention. Such application has followed the traditional concepts of fantastic and/or remote possibilities, even to the point of producing Kentucky's own "fertile octogenerian" and "unborn widow"[24] so graphically identified by Professor W. Barton Leach, the peerless nomenclator in future interests;[25] and as Professor Dukeminier points out, Kentucky appears to have brought forth the "superannuated minor."[26] The Kentucky Court of Appeals has not been averse to "remorseless" application, in defeat of intent, as in *Brown v. Columbia Fin. & Trust Co.*[27] There, Wickliffe (great-grandfather of the defendant Brown) devised land in trust to the use of his daughter, Margaret Preston, for life, then "to the use of any children *or descendants* of my said daughter, to whom she may by her last will . . . *direct, limit, or appoint* . . . and according to the *provisions, restrictions and conditions* of said will; and if my daughter should not make any such appointment, then . . . for the use and benefit of the heirs at law of said daughter." (Emphasis added.) Mrs. Preston was survived by her same and only six children (including defendant's mother) living at Wickliffe's death. Mrs. Preston's will appointed for life in equal shares to each of those six children, remainder to the heirs of the body of each particular child, at his or her death. Under the "second look" doctrine as applied to powers of appointment, one-fourth (of one-sixth) would have vested in defendant at his mother's death. But in spite of the clear language of Wickliffe's will, the Court of Appeals declared that Mrs. Preston "had the power of appointment *only* as among her children," concluding that there was a possibility (as of Wickliffe's death) that she might have additional children; and so the court preferred invalidity under the all-or-nothing concept in lieu of validity by the "second look" approach. After setting forth Kentucky's case experience with "vesting" various types of interests under the Rule, the consequences of violation of the Rule, and the handicaps of Kentucky's "perpetuities statute," the author proceeds with an explanation of the problems and process of reform by legislation in Kentucky—up to the pertinent sections of Kentucky Revised Statutes, of which section 381.215 enacts the common law rule against perpetuities "except as hereinafter modified . . . ;" and section 381.216 sets up

[24]DUKEMINIER, PERPETUITIES LAW IN ACTION 10 (1962).

[25]Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643 (1938).

[26]DUKEMINIER, *op. cit. supra* note 24, at 12.

[27]123 Ky. 775, 97 S.W. 421 (1906).

the doctrine of wait-and-see and reform by *cy pres* in the following two simple sentences:

> In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting of failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest.

In addition to the foregoing reforms, the Kentucky legislation of 1960, also cut off the "vested" status of possibilities of reverter and rights of entry, by converting a future determinable fee (and its possibility of reverter) into a fee simple subject to right of entry for condition broken and by providing termination of future rights of entry if the condition be not broken within thirty years from creation. Possibilities of reverter and rights of entry existing on July 1, 1960, may be protected and preserved by appropriate filing of declaration of intention to preserve within a specified period after that date. These changes do not apply to deeds, gifts or grants from the state; nor where public or eleemosynary institutions hold both the fee simple determinable and the possibility of reverter, or both the fee simple upon condition subsequent and the right of entry; nor to leases, easements, transportation lines, and other stated categories.[28] Except for those instances of exemption, the "two relics of antiquity"[29] have lost their unassailable defiance of the Rule in Kentucky; and for the future, only the right of entry may be utilized with a limited life expectancy. So Kentucky can at least anticipate that repetition of *Brown v. Independent Baptist Church*[30] is a minimized prospect for that jurisdiction.

It is surprising that the legal profession has acquiesced (to say the least) in the absurdities, fantasies, and pitfalls which have developed around the common law development of the Rule Against Perpetuities and its "remorseless" application. The situation has sometimes been subjected to patchwork or partial treatment of the overall problem, so that aggravation may have been the major result. *Perpetuities Law in Action* encompasses an expert's delineation of the problem, with the results of his recommendations to improve. This volume should prove to be a satisfactory manual for those desiring to chart a practical course by which to clarify or minimize the various difficulties which have been considered in it. The desire for improvement by reform

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[28] KY. REV. STAT. §§ 381.218-19, 381.221-22 (1962).

[29] LEACH & LOGAN, FUTURE INTERESTS & ESTATE PLANNING, 28 (1961).

[30] 325 Mass. 645, 91 N.E.2d 922 (1950).

seems apparent with respect to the areas covered by this book. It seems appropriate to point out that within recent months the Supreme Court of Mississippi, in *Carter v. Berry*,[31] have recognized the application of the doctrine of *cy pres* along the lines pointed out by Professor Dukeminier—and by an opinion in which "all Justices concur."

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SOVIET LEGAL INSTITUTIONS: DOCTRINES AND SOCIAL FUNCTIONS

By Kazimierz Grzybowski. Ann Arbor: The University of Michigan Press, 1962. Pp. 285. $7.50.

As Dean Allan F. Smith suggests in his Foreword, this study is "a grim story" of efforts in a vast area of the world to govern the conduct of people "through the creation or manipulation of legal institutions." It is also a well documented and thought-provoking exposition of the theory and practice of the legal systems of the Soviet Union and the post-World War II Communist states in Eastern Europe. As such, the book complements the monumental study of *Government, Law and Courts in the Soviet Union and Eastern Europe*, which the author published in collaboration with the late Dr. Vladimir Gsovski in 1959. Here, in the space of nearly three hundred pages, Professor Grzybowski considers (as the publisher's blurb on the cover indicates) such important matters as the contribution to individual freedom in the Soviet Union of the laws of property, inheritance, economy, and the very significant changes in legal philosophy and practice wrought by the Communist Party hierarchy under the leadership of Lenin and Stalin.

The architects of the Bolshevik Revolution in October 1917 were not nihilistic in their attempts to reconstruct Russian society. They constructed a legal system which was based upon a Romanist foundation and, ironically, as in the case of their Tsarist predecessors, shaped by a desire to ensure the dominance of a ruling class, *i.e.*, the proletariat. While in theory the law codes were designed to assure the power monopoly of the rural and urban working class, in practice the device sustained the rule of the Communist Party as the "leader" and "guide" of the masses. Under such circumstances, the shape and structure of the law were determined by the political objectives of the Party hierarchy. In other words, the Soviet legal system became something of

[31]243 Miss. 321, 140 So. 2d 843 (1962).

a fluid mass of legal concepts which varied in interperation according to the shifts or opportunism of Party policy. The resulting divergence between theory and practice was at no time more apparent than during the pre- and post-World War II Stalinist terror when, contrary to the protection afforded to the individual by constitutional guarantees and by Soviet civil and criminal codes, tens of thousands were arrested, tortured, and liquidated or incarcerated in slave labor camps on the basis of the Party dictum that the requirements of the state (*i.e.*, the Party) must predominate over the rights of the citizen. The accounts of Arthur Koestler, Margarete Buber-Neumann, Elinor Lipper, and others of the NKVD's unconcern with its victims' appeals to the law for protection against arbitrary arrest and the use of torture to extract confessions are eloquent evidence of the precarious position of the individual under the Soviet legal system.[1] It is also, as Professor Grzybowski illustrates, a reflection of the fact that in the Soviet Union the interpretation of the law is made within the framework of Marxist-Leninist dialectic. In this direction, his examination of the concept of Socialist legality in the Soviet Union and postwar Eastern Europe is one of the most interesting (and chilling) facets of the book.

Professor Grzybowski is, perhaps, at his best in the chapter dealing with "Homo Sovieticus." Here is an account and an analysis of how the law and a legal system can be designed to mold and determine the thought, attitudes, and behavior of people. It is a scholarly confirmation of what George Orwell and Rubashov—the hero of Arthur Koestler's *Darkness at Noon*—saw and feared as the outcome of Soviet "legality." Yet, it is an historical fact remarkably similar in some respects to the attitude which Robespierre and the Jacobin *Montagnards* assumed towards the relationship of the individual and the law during the Reign of Terror in the first French Revolution. And, can it not be said that this reflects the idea of revolutionaries of the Right and Left that the well-being of society can best be advanced by the destruction of the identity of the individual?

Of particular interest in the "Homo Sovieticus" chapter is the discussion of libel and the disappearance of suits for libel and damages from the dockets of courts in the Soviet Union and the Eastern European Soviet bloc. The protection of individual honor against libel has lost its importance because of the political role of the press and its importance as an instrument of social control and official action. This is especially true in the post-Stalin era when, as Professor Grzybowski points out, "the criticism and initiative of the press represent the only efficient means of cutting through the tangled web of Soviet agencies and

[1]The Soviet citizen's consciousness of this truism was apparent by the remark of a native of Leningrad to the reviewer in 1959 when he said, "What the law means today, it may not mean tomorrow."

of striking directly at problem spots in the social or economic life of the polity. . . ." Thus, "to impede [the] action [of the press] in the name of individual interest would be tantamount to raising an obstacle to a social action in which an attack on a person would be only an incident."

But what of the "thaw" since the death of Stalin and his denigration by the Twentieth Party Congress and its meaning for individual rights in the Soviet Union? The dismantling of the "corrective labor" camps, the release of millions of victims of Soviet legality, and the Party's admission of Stalinist "illegalities" have certainly indicated the improved position of the Soviet citizen under the law. Professor Grzybowski, however, is convinced that neither these improvements nor the Twentieth Party Congress' order for a more strict protection of individual rights can change the function of individual rights in the Socialist legal order. "It is not," he declares, "in the nature of this order to consider individual rights as absolute values." Indeed, the "social and legal reforms which followed the demise of Stalin were [largely] a response to the needs of the soviet economy . . . [and] predicated by greater opportunity for business initiative and a further strengthening of the discipline of [Soviet] labor."

The author is to be commended for having mastered a most difficult task and presented a compact and lucid study untainted by the bias or prejudice which often mars the scholarship of Eastern European *emigrés*. Professor Grzybowski's approach to this complex subject is sound and based upon a research apparatus which is remarkable for its breadth and depth. He has produced a book which (with its Bibilography) is indispensable for any understanding of the Soviet legal system and how it works.

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HOWELL'S COPYRIGHT LAW

A Revised Edition by Alan Latman. Washington, D. C.: The Bureau of National Affairs, Inc. 1962. Pp. 358. $9.25

The fact that this book is now in its Fourth Edition speaks for its usefulness. It was first published in 1942; and the yearly significant judicial, legislative, and administrative developments have necessitated the subsequent revisions; the present revision including all developments up to 1962. The author's long experience in the Copyright office has given him firsthand knowledge of the many problems that come up in actual practice, and it is to these problems that the book is directed.

The subjects considered by Mr. Howell present a broad treatment of the field of copyright law. The subject matter of the Copyright Act is analyzed and matter subject to being copyrighted is classified. Considerable attention is given to the statutory requisites for a copyright such as notice, publication, manufacturing, and registration. A thorough examination is made of the rights granted under the Copyright Act; separate chapters discuss the nature of copyright ownership, the rights secured thereby, the infringement of the rights, and tax consequence of copyright ownership.

In the appendices of the book, the Copyright Act is set forth in full together with the Committee Report on the Bill Enacting the Copyright Act of 1909 which explains the act section by section. Other information useful to those dealing with copyrights is included in the appendices, such as the Regulations of the Copyright office, U. S. Supreme Court Rules for Practice and Procedure under the Copyright Act, and Customs Regulations of Copyrighted Work. There is also a topical index and a table of cases to facilitate the reader's research.

Reading the book is almost effortless as the style is based upon clarity and simplicity. Authorities are cited which support all points made, and although this is not an exhaustive work, it is comprehensive and does cite the leading cases.

Howell's Copyright Law would be very useful for those who have occasion to do copyright work because of its excellent treatment of the substantive and procedural aspects of copyright law. Its use to the general Mississippi practitioner is questionable due to the small amount of copyright work in our state, but it is recommended to those who desire a complete library and who might expect to handle copyright work.

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BOOKS RECEIVED

FEDERAL INCOME TAXATION OF SECURITIES. John J. Boland. Philadelphia: Joint Committee on Continuing Legal Education of the American Law Institution and the American Bar Association, 1962. Pp. 172. $4.00.

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